NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED FOR REVIEW

In this case the Court of Appeals in rejecting not only various critical and dispositive findings made by the trial Court, actually created, indeed out of whole cloth, various findings of its own. The fact that the Court of Appeals, in the process of doing so, rotely credited and favored (as being supportive of its thesis) testimony provided by various police officers which had been expressly rejected by the trial Judge makes the Fourth Amendment issues in this case most worthy of the Court's consideration.

So postured, the following specific questions are submitted by this Petitioner.

I

WHETHER DUE PROCESS IS DENIED WHEN A COURT REVIEWING THE GRANT OF A MOTION TO SUPPRESS ACCEPTS AND CREDITS TESTIMONY THAT WAS EXPRESSLY REJECTED BY THE TRIAL COURT.

II

WHERE A TRIAL COURT MAKES THE EXPRESS FINDING THAT A SUSPECTED TRAFFIC VIOLATION "WAS USED AS A JUSTIFICATION FOR STOPPING AND SEARCHING THE VEHICLE AND ITS OCCUPANTS ... FOR ILLEGAL DRUGS", CAN THE SEARCH MADE IN THE WAKE OF SUCH STOP BE JUSTIFIED AS AN INVENTORY SEARCH?

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RELEVANT RULES AND STATUTES

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, **Thomas Pierce**, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on November 15, 1995, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Opinion of the Ohio Court of Appeals, against which this Petition is directed, was issued on May 25, 1995. This Opinion is designated **Appendix "A", pp. 1 to 41**, in the Appendix to this Petition. The Order denying Reconsideration of this Opinion is designated **Appendix "B", p. 35**. The Entry of the Ohio Supreme Court denying further appellate review was entered on November 15, 1995, the critical date herein. It is designated herein as **Appendix "C", p. 36**. The Opinion of the trial Court granting the Motion to Suppress is set forth herein as **Appendix "D", p. 37**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio, as indicated above, was entered on November 15, 1995. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Fourth Amendment, United States Constitution;
2. Fifth Amendment, United States Constitution;
3. §435.11, Codified Ordinance of the City of Cleveland;
4. §4503.12(c), Revised Code of Ohio;
5. §4511.06, Revised Code of Ohio;
6. §4511.12(c), Revised Code of Ohio.

STATEMENT OF THE CASE

The critical issues in this cause were raised in the State court in a pre-trial Motion which sought the suppression and the return of illegally seized evidence. This Motion was granted by the trial Court.

The State (the Respondent herein), in the wake of an interlocutory appeal, authorized by State law, secured a reversal of the trial Court's judgment. This judgment is the one centralized in our Petition. It became final, as shown above, when the Ohio Supreme Court failed to invoke its discretionary jurisdiction.

The relevant facts here are easily stated. Petitioner and two other individuals were indicted for a number of offenses that surfaced in the wake of the arrests and the searches here being challenged. Specifically these offenses were **(1)** receiving stolen property in violation of R.C. of Ohio, §2913.51; **(2)** carrying a concealed weapon in violation of R.C. of Ohio, §2923.12; **(3)** possession of a controlled substance, to-wit: cocaine, in violation of R.C. of Ohio, §2925.03; **(4)** preparation of a controlled substance for shipment in violation of R.C. of Ohio, §2925.03; **(5)** use of a motor vehicle for the commission of a felony drug abuse in violation of R.C. of Ohio, §2925.13 and **(6)** possession of criminal tools in violation of R.C. of Ohio, §2923.24.

Next the trial Court, as the Record here shows, granted the Motion To Suppress filed by petitioner. As this formal ruling, designated herein as **Appendix "D"**, shows the Court, as was his prerogative, credited the defense evidence on the dispositive issues and rejected, expressly so, most of the testimony provided by the police.

Thus it was on the State's appeal from the grant of Petitioner's Motion that the Court of Appeals in a 2-1 decision reversed the trial Court. It is this Opinion that is here being centralized.

Significant here, the trial Court expressly credited the defense's proof in finding that the arrests here involved occurred at the point when the armed stop was made (**Appendix "D", p. 39**). The Court of Appeals in rejecting the trial Court's findings in this regard, apparently did so without realizing the compelling significance of its statement that the immediate "search" made by these officers (at gunpoint) of the car's occupants had actually occurred before the gun (found secreted under the floor mat) or the drugs (found in the trunk) were discovered. Surely the Court can be credited with knowing that any right to conduct the immediate search conducted here was dependent upon the right to make a valid arrest.

With the above insuperable thesis in mind, the majority's reasons for trying to smuggle Thomas Pierce's ultimate revelation that he was a fugitive into the relevant facts was done for such an ulterior purpose as to make for a fact of considerable significance here. In any event, the Record shows that early-on the majority started forging its various false major premises. Specifically, the reference here is to our assailment of the following artificial findings used by the author of the Opinion as premises for the false conclusion reached in his Opinion:

> In light of the testimony of Detective Petrovich that he learned through police channels that the Cutlass bore a license assigned to a Chevrolet (and [was being] operated by one with a fictitious driver's license and who was not the owner) and carrying a passenger reputed to be involved with drug trafficking; and admittedly in a high crime area, comprised sufficient justification to warrant a stop. **Opinion, Appendix "A", p. 23-24**. (Emphasis supplied.)

The grim fact here, one that is, both, indisputable

and unassailable, is that no police officer, including Detective Petrovich, was made aware before the vehicle stopped it was being "operated by one with a fictitious driver's license." (Ibid.) The proof showed the police only learned from Pierce (which could only have occurred after his *arrest*) of his fugitive status. Indeed, this revelation actually occurred *after* the gun and the contraband had been found. Simply put then, the absolute fact is Thomas Pierce only admitted to his fugitive status when it became apparent that his passengers were going to be charged with possession of the gun and the drugs that had by then been found in the car. The effort there made included petitioner stating his passengers had no knowledge of anything found in the car. In so doing, he only revealed what the police would have learned later -- i.e., that his true name was not Robert Hale, but Tommy Pierce.

Also, the facts critical to this appeal include certain significant admissions made by the State's counsel during the Hearing on the Motion to Suppress. These admissions are so binding on the State that to the extent the Court of Appeals failed to reckon with them, its Opinion is further flawed and unacceptable. Here counsel argued:

THE COURT: You are not disputing, I gather, that she [the owner of the car, Fransheria Cannon] actually was entitled to drive that vehicle with that plate on it? You are disputing whether the evidence that she had was satisfactory?

MR. SHELDON: *No, your Honor.* I'm disputing that you can't have the plates on that

vehicle without sufficient indicia of ownership in the car.

THE COURT: Well, see, my question is, did she have the right to transfer the plates -- drive that car with the plates transferred, once she purchased the other car?

MR. SHELDON: Did she have the right to transfer the plates?

THE COURT: Did she have the right to transfer the plates from her old car to the newly purchased car?

MR. SHELDON: *Yes, she had this right.*

THE COURT: So that the issue is whether or not -- whether the evidence of her right to do that was satisfactory. Isn't that what the issue is?

MR. SHELDON: No. We already decided that she had the right to do that. The question is whether or not a person, other than herself, can drive that vehicle when the plates have not yet been transferred, without sufficient indicia of ownership in this vehicle. That's the ultimate question.

THE COURT: I think we are saying the

same thing.

Tr., pp. 414-417. (Emphasis supplied.)

The upshot of the points made above is that *any position contrary* to the thrust of counsel-opposite's judicial concession (made herein by the State) that the owner of the car could indeed properly operate the car with "the plates" (with which we are here concerned) rightly should be deemed to have been waived.

Here it should be noted the State fully contended at the trial level and in the Court of Appeals that the stop made of this car was for the purpose of the officers investigating a passenger. And, that in so doing they sought to learn whether the car, which had a temporary license tag on it, was stolen.

In addressing these issues the trial Court's expressed view was that the methods employed by the police were illegal.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Reviewing Courts, including those in Ohio, must be made to understand they cannot substitute their own subjective interpretations of the evidence for those rendered by the finder-of-the-facts. Why this rule (which is not only indisputable, but) is necessary is truly vindicated here. For not unlike the Judges elsewhere, those here were overly prone to simply ignoring rulings made by the trial Judge that are amply supported by the Record and substituting their own views of the evidence.

Here the trial Judge made specific findings of fact as to the testimony presented and provided by a thorough analysis of the totality of the circumstances regarding the lawfulness of the stop, the arrests and the searches made of the petitioner and those in the car. Since the Appellate Court lacked the power to make a *de novo* determination of any of the factual issues that were resolved by the trial Court on the basis of the credibility determinations made by

him, it follows that there was no basis in the Record, and none was stated in the Opinion, for rejecting findings made by the trial Court. While the trial Court credited testimony provided by the petitioner and one of the officers, the appellate Court relied on testimony, some of which was specifically rejected by the trial Court, provided by different officers.

Stated another way, inasmuch as the trial Judge not only heard the testimony and observed first-hand the demeanor of all the witnesses and made his findings, which credited the defense evidence, it is at once apparent the Appellate Courts' reliance on the large segment of the testimony provided by Detective Walker, quoted in its Opinion (**Appendix "A", pp. 5 to 18**), is sorely misplaced and misdirected. It is also irrelevant and beside the point. This follows *unless* the Court is also holding (as appears to be the case) that a trial Judge is barred from rejecting the testimony of police officers.

Since some of us know police officers do routinely lie, see **State v. Dodson** and **State v. Hunt**, both **supra**, particularly if they are from Cleveland (see **United States v. Alexander, 740 F. Supp. 437 [1990]**), the fact that the majority of those on the Court of Appeals were unimpressed with this easily demonstrated reality does explain a lot. What should be understood here is that one of the critical findings *rejected* by the appellate Court was the insuperable and unassailable finding, made by the trial Court that the police did not have reasonable cause to believe the vehicle was improperly licensed. (**Appendix "D", Ruling on Motion to Suppress, p. 40.**)

Of course, it should also be noted, as shown elsewhere, the statement in the Appellate Court's Opinion that "the police found no evidence of car ownership" is one that can hardly be deemed worthy of being given any significance in light of the defense evidence and the

testimony by Officer McCauley that she saw the envelope that had the data in it in the car and the trial Court's findings as to the contents of that envelope. And, the Appellate Court's statement that Pierce told the officer at the scene and *before* they found the gun his driver's license was fake, falls in a lower category than the Court's statement that while "Pierce [who at that point had only identified himself as Robert Hale merely] claimed there was evidence in the glove compartment" he failed to disclose what that evidence was" (**Appendix "A", Opinion, p. 24**).

The fact that the Appellate Court recognizes that Pierce did tell the officers the necessary papers were in the glove box, where the trial Court found they were, really says all that needs to be said. Simply put, it is unreasonable to penalize the petitioner because Detectives Petrovich and Walker did not see what Officer McCauley saw, or to penalize petitioner because McCauley refused to open the envelope and look inside. It is likewise wrong to penalize Thomas Pierce for not telling them what documents he was referring to as being in the glove compartment (according to Walker, but not Pierce). For, after all, Pierce offered to get them and the officers, doubtless while venting their paranoid fear for their safety, refused to allow him to do so. With this being so, it seems any onus that was present in the context of this factual scenario was on the police, not the persons they were pointing the guns at.

This brings us to the trial Court's finding that "the police had [certain] information" (**Id., p. 24**) which they failed to act on appropriately (**ibid**). The problem with the Appellate Court's degradation of this finding is not that it is clearly erroneous, it seems the Court was simply unwilling to credit the trial Court's findings based on the defense evidence and McCauley's testimony that these documents were in the car.

Here it is worth repeating, it is up to this Court, as we see it, to explain to the Courts in Ohio that they are powerless to make findings that require it to reject factual findings made in the wake of credibility determinations made by trial Judges. And that this is so even if those determinations make it clear that the testimony of some police officer or police officers was rejected -- for whatever reasons, including the fact that in many instances they wilfully lie and in others their testimony has too many holes in it.

ARGUMENT NO. I

DUE PROCESS IS DENIED WHEN IN REVIEWING THE GRANT OF A MOTION TO SUPPRESS, THE COURT IN ADDITION TO REJECTING VARIOUS ESSENTIAL FACTUAL FINDINGS MADE BY THE TRIAL JUDGE (WHICH FINDINGS EXPRESSLY CREDITED THE DEFENSE VERSION OF THE FACTS), ACTUALLY CREDITS TESTIMONY PROVIDED BY VARIOUS POLICE OFFICERS, WHICH TESTIMONY NOT ONLY CONFLICTED WITH SUCH FINDINGS, BUT WAS EXPRESSLY REJECTED BY THE TRIAL COURT.

One reading the analysis made below will quickly realize the extent to which the author of the majority Opinion obviously believed they could reject with impunity critical and dispositive findings of fact made by the trial Judge, and that they could do this although these findings had ample factual support in the Record. Further, it shows a belief on their part that they could then substitute their own findings.

Indeed, in so doing, it is likewise clear the Appellate Court was convinced that they could premise the ultimate conclusions drawn, by them, on testimony that was expressly rejected by the trial Court. And, that this they

could do because of an apparent belief that the trial Judge was bound by the testimony he chose to reject because it had been provided by narcotic police officers.

Granted the testimony accepted by the trial Judge as premises for his dispositive rulings was provided by people in whose possession a serious quantity of drugs was admittedly found. But who would disagree the fact that drugs were found cannot be used as a basis for validating, either, an illegal arrest or an illegal search.

The Court of Appeals in rejecting the trial Court's various findings, which they did without expressly making the determination that the rejected findings were *clearly erroneous*, simply ignored the fact that the State is yet to contend Thomas Pierce was originally arrested for having a fictitious driver's license and that the search of the car was incident to that arrest. Even this is not all. The State must be credited with conceding that it was after the arrest and the searches were complete that petitioner identified himself as Thomas Pierce and indicated he was a fugitive.

With this being so, it follows the expressed predicates for the Appellate Court's reversal, of the grant of petitioner's Motion to Suppress, cannot be defended in law, logic or common sense. Nor, can it survive the contention here made that petitioner was victimized by both the police who willfully and brazenly violated his rights, *and* by Ohio's reviewing Courts. The Courts referred to not only arbitrarily rejected the trial Court's findings and substituted their own (some of which were made out of whole cloth and have actually no factual basis in the Record), they did so on the basis of non-existent legal theories and pathetic reasoning patterns.

Our confidence in the efficacy of this assailment will be borne out by the fact that no effort will be made by counsel-opposite to defend certain indefensible factual assertions made by, and relied on by, the writer of the

Majority Opinion as major premises in his pathetically constructed syllogism.

Having said that, the analysis below of the Majority Opinion seems appropriate. This is particularly so here given, both, the extreme difficulty one encounters in Ohio's Courts when they attempt to preserve the very rare grant of a Motion to Suppress in the wake of an appeal by the State. **See, e.g., State v. Dodson, 43 Ohio App. 2d 31 (1974); State v. Hunt, 22 Ohio App. 3d 43 (1984); State v. Welch, 18 Ohio St. 3d 88 (1985)** and **State v. Evans, 67 Ohio St. 3d 405 (1993)**. Cf., **Beck v. Ohio, 379 U.S. 89 (1964)** and **Doyle v. Ohio, 426 U.S. 610 (1976)**.

From this case, what one does get is some insight as to why this is so. Simply put, it is well known that our Court has never hesitated to recognize that credibility determinations are rightly made by the finder-of-the-facts. And, that such findings will not be rejected unless clearly or manifestly erroneous. However, if this case is any indication, that clearly does not appear to be what happened here. Indeed, it is obvious enough that most of the necessary predicates for the Appellate Court's dispositive theses were literally made out of whole cloth. While we submit that is bad enough, some of that Courts' findings actually clash with indisputable testimony and express findings of fact made by the trial Judge. The upshot of this fact is further augmented by the cogent tenet that the trial Record should be read in the light most favorable to the party that prevailed in the lower Court. Clearly that was not done here.

Our first specific reference is to a most critical finding made by the Appellate Court, which likewise clashes mightily with certain unequivocal testimony in the Record. Here the Record shows **Detective Roman**, the officer who issued the traffic ticket to Robert Hale (who much later turned out to be Thomas Pierce) *testified as follows*:

Q. At that time during your conversation with the defendant, did he represent himself to you as Robert Hale?

A. Yes, he did.

Q. Now, other than the ticket for .... What was the ticket that you issued to him?

A. Plates not issued to the vehicle or auto.

* * *

Q. Did you give him a copy of that ticket at the scene?

A. Yes, I did.

Q. Now on that particular ticket, is there any other name, other than Robert Hale?

A. No. There is -- the only name on there is Robert Hale that I was issuing the ticket -- *we were in the process of inventorying the vehicle to be towed, but we wouldn't -- I was told there was no confirmation on who owned the vehicle. At this time I was also informed that there was a gun in the vehicle*. So I turned around and advised them of their rights.

Q. Now did Robert Hale, at the scene, ever provide you with another name?

A. After I issued the ticket and I advised him of his rights, he told me that, in fact, he was not, in fact, Robert Hale, but that his name was Thomas Pierce.

Tr., 306-307. (Emphasis supplied.)

Clearly one can only read the above quote from the testimony of the officer (that issued the ticket) as showing that when the search of this car was started Thomas Pierce

was already under arrest *and* the officers were in the process of searching the car when the gun and the drugs were found. With this being so, the question that arises is not why was it necessary for the Court to literally manufacture in the Opinion an artificial sequence of events because the reason is apparent. Rather, the apt question is, how can it be said and factually determined to be a dispositive finding that:

> In addition, after the initial stop was made, *the police determined that the driver, Thomas Pierce*, who was not the owner ... [was] *an admitted fugitive with a fake driver's license*, was unable to produce vehicle registration, certificate of title or any other proof of ownership. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. *Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy*.

Appendix "A", Opinion, p. 22. (Emphasis supplied.) Even worse than that, how can it be said with impunity that:

> The police found no evidence of car ownership. *When the driver was asked by the (ticketing) officer for identification Pierce produced an Ohio driver license in the name of Robert Hale which Pierce admitted was a fake permit used by Pierce to evade apprehension and extradition resulting from his then status as a fugitive*.

Id., p. 24. (Emphasis supplied.)

Of course, it goes without saying that the above quoted findings, by the Court of Appeals, that Pierce admitted he was a fugitive *before* the weapon or the

contraband were found is not only flawed, artificial and totally inaccurate, as a dispositive finding it is really beyond belief. This is particularly so since the trial Court must be credited with having accepted Thomas Pierce's testimony that he only revealed his true name once they transported him to the Justice Center (**Tr., p. 375**). In other words he told them his name was Pierce at the station house.

What is significant here is the Court of Appeals was required to credit the trial Court's findings in this regard. Here too the trial Court determined that certain documents, which satisfied him, were present in the glove compartment at the time of the stop. *This finding was based on the testimony provided by Thomas Pierce and Fransheria Cannon ....*" (**Appendix "D", Ruling On Motion To Suppress, p. 23**). (Emphasis supplied.)

With this being so what is here being seriously questioned is how the required determination could be made, if it was made, that the trial Court's precise findings on these points were *clearly erroneous*. This fact places the various contrary findings by the Appeals Court in the same unacceptable category as the Court's reliance on so much of the testimony provided by Detective Walker, during his direct examination. As we see it, there is only one reason why the Appellate Court quoted a seventeen (13) page segment of Detective Walker's direct testimony which is spread over **pages 5-18** of its Opinion in the Appendix to this Petition at **Appendix "A"**. Its purpose was to have a source (albeit one that was expressly rejected by the trial Judge) for that Court's critical thesis.

Again it is worth repeating, as we see it, that the testimony relied on by the Appeals Court was heard by the trial Judge and in large measure rejected by him -- as was his prerogative. This follows since a trial Judge is not required to gospelize testimony provided by any police officer. In short, the doctrine of *falso in uno falso alterious*

applies full strength to the testimony of police officers as it does to other witnesses. Of course, it is also a fact that Detective Walker fully admitted that certain critical aspects of his testimony could not be reconciled with testimony previously rendered by him at the Preliminary Hearing on this matter.

Next, it has apparently been overlooked by our Court of Appeals, or simply not understood by those in the majority, that not only did Thomas Pierce testify contrary to certain evidence provided by Detective Walker -- **i.e.**, that Walker ran the plate and waited in his car until he got the report (an event that could only have happened *after* the stop had been made), so did Detective McCauley. Here Detective Walker testified:

> Q. The third member of this vehicle is a known reputed drug dealer in the Longwood Project area. *We decided to follow the car to see if we could find out anything further on this.* Meaning the fact that he is a reputed drug dealer in the Longwood area. Do you recall saying that?
>
> A. Yes, sir.
>
> Q. Then we ran the licence [sic] plate of the vehicle and the license plate came back listed to a vehicle which the plates were not on.[1] We pulled the car over

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[1] Only a policeman trying to justify a search made of a vehicle stopped in one of Cleveland's inner-city "hoods" would suppose that merely because the plate was not on the car it was listed to translates into a valid belief, or probable cause to believe, the car was stolen. This follows because the law allows plates to be transferred in the

at approximately Star and Addison Road. It was during this time we got out of our detective vehicles and identified ourselves as police officers. We had the vehicle surrounded. *It was during this time that McCauley -- Detective McCauley, badge 16, observed what appeared to be a gun handle protruding underneath a floor mat in the rear right seat. Do you recall giving that testimony*?

A. *I do, sir.*

Q. Now that's different; isn't it? What you are telling this Court is different from what you told that judge under oath in the Cleveland Municipal Court; isn't it?

A. It's semantics. *It's not consistent with what I say today.*

Q. Let's use a different word. Try my word. That's different.

THE COURT: He may not like your word.

BY MR. WILLIS:

Q. That's different, to say that Officer McCauley, after you surrounded the car, looked into the car and saw a gun protruding out from under a seat -- under a floor mat. That's different from saying that the people were ordered out of the car and Detective McCauley found the gun when she was taking inventory. Those two statements are

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circumstances present here. See **R.C. of Ohio, §2945.03.**

irreconcilable; aren't they?

A. They're different.

Q. Thank you. Yet both statements were given under oath?

A. Yes, sir.

Q. *Then you agree one has to be perjury if the other is the truth*?

A. *No, sir.*

MR. SHELDON: Objection.

THE COURT: He can ask that question, and he disagrees.

Tr., pp. 169-171. (Emphasis supplied.)

Significant here, it should be noted that, not only did Detective McCauley expose Detective Walker's mendacity on this salient point, her testimony was that it was *after the defendants were out of the car and secured that she then saw the gun* which had been covered by the floor mat to the rear seat (**Tr., p. 269**).

Roman's testimony was that he "waited for the listing to come back on the plate...." (**Tr., p. 316**). This wait, he testified, could have taken five (5) minutes (**ibid**). Now, no matter how this testimony is read, it can only favor Thomas Pierce. For *if* it is read that Pierce was outside the car with a gun pointing at him and the other occupants of the car were likewise out of the car (as the trial Judge found), then clearly it had to have been much later than the Appellate Court's Opinion suggests when the ticket was issued for the license plate violation. This follows if we simply credit the statement in the Opinion that Detective Petrovich was involved in the searches made of the defendants after they had been ordered out of the car (**Appendix "A", Opinion, p. 24**). For clearly if Petrovich was searching them "out of concern[] for his own safety" (**ibid**), then surely the Court will agree the five minute wait for a response to the queries about the plate had to have

occurred much later -- after these searches had been made. If not read that way, then it is at least clear that Officer Roman's testimony was irreconcilable with that of Officer Walker on when Roman got out of the car. Walker places Roman with those who ordered the defendants out of the car at gunpoint (**Tr., pp. 161-162**). His testimony further shows the police were fully engaged in searching the car when they discovered the gun and the contraband. All this occurred *before* they learned a fact the trial Judge deemed significant -- that is, that although the license plate had been issued for a different car, the person identified by Thomas Pierce as the owner did in fact own both the plates and the car as the documents in the car showed.

The above analysis, which exposes the gross flaw in the Appellate Court's ratiocinations, should suffice to lead to its total rejection. Additionally, other segments of Walker's testimony expose the folly one must engage in to accept the Appellate Court's oraculation of Walker's testimony. Here too it should be noted that Walker testified without equivocation that the Cleveland Police Department had no written policy with reference to closed containers encountered during an inventory search (**Tr., pp. 172-174**). Apart from the fact that the segment of his testimony isolated above is a reflection on his training (**ante, pp. 15-17**), the Court's failure to address the **Florida v. Wells (495 U.S. 1 [1990])**, issue is hardly something that can be ignored. For reviewing Courts are required to sustain rulings made by trial Judges if any basis exist for doing so in the Record. The reverse is not true. And, of course, when one reads Walker's testimony it shows Roman was in the cadre of officers who immediately surrounded this car with their guns drawn. Walker so testified at the Preliminary Hearing and at the trial (**Tr., 175-177**).

Simply put then, a fair distillation of the testimony by Detective Walker (that was before the trial Court, and

which the Court of Appeals deliberately failed to reckon with) shows that this officer was supposedly investigating ownership of the car when he undertook to make his searches (**Tr., p. 28**). Significant too, Walker tells us he was only one of three officers that looked in the glove box (**id., pp. 29-31**). This officer says he was looking for "a registration" (**id., p. 32**). While Detective Walker denied that Pierce had told him the car had recently been purchased, the trial Court must be viewed as having rejected the officer's testimony on this point in favor of Pierce. In other words, the trial Court determined that Pierce so advised the officers.

Next, the Record shows Walker was asked by the defense the following questions:

> Q. Officer Walker, showing what has been marked for purposes of identification as Defendant's Exhibit I, I'll ask you what is the fact as to whether or not this envelope, Exhibit I, and there's two pieces of paper which I also identify were inside the envelope and in the glove compartment, what is the fact as to whether or not they were in the glove compartment?
>
> A. *The fact is, I did not see it, sir.*

THE COURT: Let me see those, please.

BY MR. WILLIS:

> Q. Officer, I showed you Defendant's Exhibit I-1, which was the same as Defendant's Exhibit B; is that right?
>
> A. Yes, sir.
>
> Q. As being one of the items in Exhibit I, and the other item that was in Exhibit I, according to the defense, is ... what appears to be a bill of sale for a car that

was purchased from the Lease Corporation in Willoghby [sic]. Will you accept that?

A. It's here, yes, sir.

* * *

Q. Do you -- did you see either one of these items in the car?

A. No sir.

Q. For some reason he did not keep them in the car?

A. I did not see them, sir.

THE COURT: You are saying that you did not see them period or you don't remember seeing them?

THE WITNESS: I did not see them period.

THE COURT: Okay.

Id., pp. 189-190.

It is a *reasonable* inference here, in fact it was *unreasonable* for the Court of Appeals to conclude other than as the trial Court did, that these documents were in the car and in the envelope Detective McCauley was to testify she actually saw in the car. But even this is not all. If we agree the Court's prerogatives also included the right to credit the defense evidence, which was not consistent with Walker's and Petrovich's sequence of these same events, then clearly the Appellate Court's summary rejection of these findings must be deemed to have been unacceptable.

Simply put, the defense evidence, which was credited by the trial Court, shows (at the very least) that *while* Pierce and the others were being detained outside the car and had already been searched and items removed from Pierce's pockets by one of these officers, Detective Petrovich was then searching the glove box, McCauley was

searching the interior and Walker was searching the trunk. It was obviously during this interim, which had to be before he learned of the listing on the license plate, that Roman was told, as he says he was (**ante, p. 12**), that the gun had by then been found. We know this was done by Detective McCauley because she admits to having done so.

Again, the trial Court obviously believed, and must be credited with having believed, the defense's evidence (contributed by all of those in the car) that these searches commenced immediately *after* they were forced at gunpoint from the car. With this being so, the contrary conclusion was simply beyond the power of any reviewing Court to draw. Now if we are wrong in this, then the Court should have explained why this is so. In so doing the Court could have, as counsel-opposite must, reckoned with the following segment of Detective Roman's testimony. Here the Record shows:

Q. Can you relate how you became involved in that stop?

A. We were the last car in the procession when the car was pulled over. *There was a license plate run and I was sitting in the car waiting for the computer* -- the dispatcher to come back with the listing to the vehicle.

* * *

Q. Now when you approached -- first of all, did you approach the vehicle?

A. *I waited for the listing to come back on the plate.*[2] *When I got the listing back,*

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[2] As shown elsewhere Roman says he could have waited five minutes for the report to come back with the details of the plate and the cars (**ante, p. 17 & Tr., p. 316**).

that came back to a Chevy. I went and took out my ticket book, citation book.

Q. Did you issue a ticket for the improper plate?

A. Yes. *I walked up to a male that was -- that I was told*[3] *was behind the steering wheel of the vehicle and I asked him for his driver's license, and he gave me a driver's license.*

* * *

Q. At that time during your conversation with the defendant, did he represent himself to you as Robert Hale?

A. Yes, he did.

Q. Now, other than the ticket for -- strike that. What was the ticket that you issued to him?

A. Plates not issued to the vehicle or auto.

Q. Detective, handing you State's Exhibit 5 for identification, would you take a look at this document and tell me whether or not you recognize it?

A. Yes. *It's a copy of the citation I issued for -- on Star and Addison, for plates not issued for a vehicle.*

* * *

Q. Did you give him a copy of that ticket at the scene?

A. Yes, I did.

---

[3] This fact further confirms that the arrest here had already occurred before the police got a listing on the car. It also verifies that the search was in actual progress when the police learned anything about the listing.

Q. Now on that particular ticket, is there any other name, other than Robert Hale?

A. No.... The only name on there is Robert Hale that I issued the ticket ....

Q. So at the scene of the crime, did you know this individual's true identity?

A. *No, I did not.*[4] *As far as I was concerned, his name was Robert Hale.*

(Tr., pp. 303-308).

Granted this witness was to later say that the revelation of the name Thomas Pierce occurred on the scene, but he was quick to add that this occurred "*[a]fter he had been informed there was a gun found in the car*" **(id., p. 308).** (Emphasis supplied.) With this being so, whether the Appellate Court rejected Pierce's testimony that he only identified himself at the station or not, one cannot overlook Walker's flawed credibility or deem it an irrelevant consideration. One should not forget Walker's original testimony was that the gun and contraband were found after Pierce had given Walker *consent* to look for the registration. Nor, should the Court have disregarded the defense evidence, most of which was expressly credited, and other segments thereof that were inferentially credited.

Now, we are aware that reviewing Courts routinely reject defense versions of the evidence when the shoe is on their other foot. Well, the shoe was on the prosecutor's foot and not unlike defendants when they are the appellant,

---

[4] With this categorical testimony before it how could the Court of Appeals, even apart from the trial Court's contrary findings, openly declare that the police knew of Pierce's fugitive status and the fact that his driver's license was a fake before it made these searches?

they were simply stuck with any factual findings made, or reasonably inferable from the rulings made, against them. We understand this. We do not understand why the Appellate Court did not.

ARGUMENT NO. II

WHERE THE TRIAL COURT MAKES THE EXPRESS FINDING THAT A SUSPECTED TRAFFIC VIOLATION "WAS USED AS A JUSTIFICATION FOR STOPPING AND SEARCHING THE VEHICLE AND ITS OCCUPANTS ... FOR ILLEGAL DRUGS," IT FOLLOWS THAT ANY SEARCH MADE THEREAFTER CANNOT BE JUSTIFIED ON THE BASIS THAT IT WAS AN INVENTORY SEARCH.

If there is any thing that seems to be well settled it is the premise that for any inventory of a motor vehicle to be legal, the car must be lawfully in the possession of the police. See **South Dakota v. Opperman, 428 U.S. 364, 368-369 (1976)** and **Harris v. United States, 390 U.S. 234, 237 (1968)**.

In resolving the appeal against the petitioner, the Court in the following quote from the Majority Opinion exposes the extent to which the Court, both, misread the Record and ignored other critical and unassailable findings that were made by the trial Judge. It also shows the vast extent to which facts were artificially created to justify the *ad hoc* position ultimately expressed. Here the majority Opinion states that:

> Considering all these factors that became part and parcel of the totality of the circumstances, we conclude that the state successfully bore the burden of proof by demonstrating that the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App. 3d 126.
>
> *In the aftermath of the inventory*, a loaded gun was found in the vehicle, as well as crack cocaine and cocaine powder discovered in the trunk of the car; all of which were claimed by Pierce.

Appendix "A", Opinion, p. 28.

First off, as shown above, the conclusion that the contraband was found in this car (or even any of it) "[i]n the aftermath of the inventory" made of the car *is truly a false statement*. The same is true of the statement in the Appellate Court's Opinion that while the police were "en route" to where the car was stopped by them they "learned through the police department computer that the plates on the Cutlass" were not registered to that car. (See **paragraph 4** of the Court's analysis of the evidence, **Appendix "A", Opinion, p.26.**) Also, it is not a fact, and it was not determined by the trial Judge to be a fact, that the driver, almost immediately after being stopped, identified himself as Thomas Pierce. Indeed, the most that can be said for this is that Officer Roman testified this happened after the gun had been found; whereas petitioner (in testimony credited by the trial Judge) says he only told this to the police at the police station (**Tr., p. 375**). (Cf., **paragraph 5 of the Opinion, Appendix "A", pp. 26.**)

Paragraph 6 of the Opinion is likewise indefensibly flawed. This follows because no police officer ever testified Thomas Pierce told them he had won a Motion to Quash Evidence before. The only reference to anything of that nature occurred in response to the State's original thesis, which was that Pierce had consented to the search. It was evidence that tended to show that, not unlike most people encountered by the police, or otherwise intimidated by them, Pierce had enough sense not to consent to a search which he knew would yield, as it did, contraband.

Again in **paragraph 7**, the **Opinion (id., pp. 26-27)** makes still another gross misstatement. This follows if the Court's use of the word "after," was meant to convey to one reading the Opinion that Thomas Pierce told the police his true name was not Robert Hale before he was taken to the police station, or before they *arrested* him or even before they located the contraband. This follows because no one, we repeat, no one, testified this happened before any of these things happened.

With this being so, the statement is not merely misleading, it is more than that. With the assailment of paragraph 7 (ibid) being as compelling as it surely and indisputably must be regarded, the statement that the original arrest here of Pierce could be justified on the basis of his lack of "a valid Ohio driver's license" (**paragraph 8**), is ludicrous and totally indefensible. Proof this is so is gleaned not only from the State's failure to even suggest such a blatantly inappropriate thesis, but by the total lack of any factual frame of reference for the statement itself.

As to **paragraph 10 (id., p. 27)**, we concede it to be a fact that Petrovich and Walker testified they did not find any relevant documents in the glove box. And, their testimony could have been deemed dispositive if the State were the appellee in the Court below. But, such was not the case presented to the Court of Appeals. With this being so, the Court was required to accept the findings made by the trial Court. On this point the Record shows, beyond dispute, that the trial Court not only rejected their testimony, but he accepted that provided by Officer McCauley, Thomas Pierce and Ms. Cannon, the owner of the car. Since his findings in this regard were not only his prerogative to make, and they were not clearly erroneous, it follows the Appellate Court's Opinion to the contrary, notwithstanding, cannot survive meaningful scrutiny. This is particularly so when one considers what it conclusively

shows about the testimony of police officers in general and these officers in particular. Here the Record shows Detective McCauley gave the following evidence:

Q. Now you told us, if I remember correctly, that while inventorying this car, that you saw this envelope?

A. *I seen an envelope.*

Q. *But you didn't care to look in it?*

A. *No, I did not.*

Q. *And you didn't put anything in the inventory sheet about seeing an envelope in the car?*

A. *No, I did not.*

Q. Aren't you supposed to take the inventory to insure that false claims of theft and the like would not be alleged against the police?

A. That's correct.

Q. In other words, a person had a thousand dollars in this envelope and claimed that, and the envelope you saw had a thousand dollars in it, and when you got the car and this wasn't in the inventory, that wouldn't have served police in any way, would it, because you didn't bother to look?

A. *Two other officers had already inspected that envelope. I see no reason for me to look into it as well.*

Q. *In other words, you seen ... Mr. Keith Walker and Petrovich inspect that envelope?*

A. *Yes, I did.*

Q. What did they say to you about the envelope?

A. *They said there was nothing in there pertaining to Mr. Hale's ownership of the car.*

Q. *Well, did they say there was anything in there about anybody's ownership of the car.*

A. *Thess [sic] said there were papers that did not apply to Mr. Hale.*

Q. But did they say anything about papers that apply to Miss Fran[sheria] ... Cannon. Did they say there was a paper that applied to her ownership of the car?

A. *There was information pertaining to a 30 day tag.*

Q. A 30 day tag?

A. Yes.

Q. *In the name of Fransheria Cannon*?

A. *They didn't give me the name.*

Q. So inasmuch as they had seen the envelope and inspected the contents, *you didn't see any need to record there was an envelope in there with the leasing company name on it; right*?

A. *That's correct.*

Tr., pp. 275-277.

Also, the statement (repeated in **paragraph 13 of the Court's Opinion, Appendix "A", p. 27**]) as to when the inventory was commenced likewise must go into the dumpster. This follows for the further reason that the defendant's testimony was that the bag in the trunk was fully closed and the evidence did not show, in accordance with **Florida v. Wells**, the police had a policy of opening closed containers.

CONCLUSION

Where evidence is merely conflicting, a court of review will not substitute its judgment for that of the trier-of-fact. This tenet is almost universal. With this being so, how can it be overlooked that the trial Judge, despite *police* testimony to the contrary (which the Appellate Court doubtless preferred to credit) ruled the petitioner's Fourth Amendment rights were violated. So postured, the conclusion is really inescapable that the various findings made by the trial Court as his basis for his suppression determination provided more than an adequate basis for the Appellate Court to presume the trial Court credited the defense testimony in all the critical areas where there was conflict.

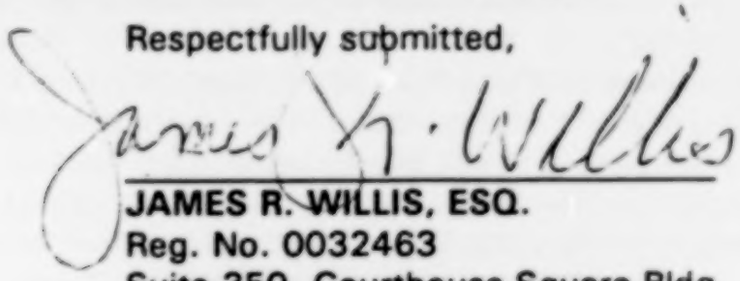
Of critical importance to any resolution of this appeal is the fact that the officers must be credited with having been aware that the law of Ohio is clear enough that:

> Transferable plates can legally be displayed on a newly acquired vehicle for a period not to exceed 30 days. After 30 days, the operator displaying transferable plates not legally transferred to the newly acquired vehicle is in violation.

Tr., pp. 112-113. Indeed, the Record shows Detective Petrovich read the memo from the Bureau of Motor Vehicles, which was a part of the documents in the envelope that was found in the car. The fact that this officer stated he would have in any event (in spite of the position of the Bureau of Motor Vehicles) towed the car because the plates were not listed to that car is hardly something the Appellate Court should have ignored. This follows for several reasons, including the fact that the trial Judge obviously factored the brazenness of this testimony and the exhibit into his resolution of the Motion to Suppress in favor of the petitioner in this case.

With this being so, absent findings that cannot be, and were not, made in the Opinion rendered by the majority in the Court of Appeals, this Court should review this cause to the end that justice can be done this petitioner.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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DATE OF ANNOUNCEMENT OF DECISION: MAY 25, 1995

CHARACTER OF PROCEEDING:	Criminal appeals from Common Pleas Court, No. CR-301570
JUDGMENT:	REVERSED & REMANDED
DATE OF JOURNALIZATION:	_____

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*AUGUST PRYATEL, J.:

Appellant, State of Ohio, appeals from the judgment of the Cuyahoga County Court of Common Pleas which granted the motions to suppress "illegally" obtained evidence filed by appellees, Thomas Pierce, Napoleon Durden and Nathaniel Flowers. Appellant assigns one error for this court's review.

Appellant's appeal is well taken.

I. THE FACTS

On November 2, 1993 appellees, Thomas Pierce, Napoleon Durden and Nathaniel Flowers, were indicted by the Cuyahoga County Grand Jury in a six count indictment for receiving stolen property in violation of R.C. 2913.51; carrying a concealed weapon in violation of R.C. 2923.12; possession of a controlled substance, to-wit: cocaine, in violation of R.C. 2925.03; preparation of a controlled substance for shipment in violation of R.C. 2925.03; use of a motor vehicle for the commission of a felony drug abuse in violation of R.C. 2925.13 and possession of criminal tools in violation of R.C. 2923.24.

On November 24, 1993 Thomas Pierce and Nathaniel Flowers were arraigned whereupon each entered a plea of not guilty to the indictment. On December 8, 1993 Napoleon Durden was arraigned whereupon he also entered a plea of not guilty to the indictment.

Appellees each filed a motion to suppress illegally obtained evidence. On January 7, 1994 the trial court held a hearing on appellees' motions to suppress.

During the hearing, the following facts were developed. On September 1, 1993 the Street Crimes Unit of the Cleveland Police Department was investigating an illegally parked vehicle near the intersection of East 71st Street and St. Clair. The unit suspected that the parked vehicle was involved in the sale and/or transportation of

illegal drugs.

The Street Crimes Unit's main responsibility is the enforcement of the drug laws of the State of Ohio. The unit is comprised of approximately fifteen members who generally deploy themselves in numbers large enough to outnumber and overpower any resistance of people the unit may encounter who are suspected of drug trafficking.

On the date in question, eight members of the unit were investigating an automobile illegally parked from the curb when they observed a second automobile, a 1987 Oldsmobile Cutlass, being driven south along East 71st Street.

Detective Walker of the Street Crimes Unit noticed that one of the passengers in the Cutlass was appellee Nathaniel Flowers whom he had known since childhood. Walker testified that he had received certain information linking Flowers to the sale of the illegal drugs.

Based on Walker's belief, the unit left its investigation of the parked automobile and proceeded to follow the Cutlass. Thomas Pierce was operating the automobile, Flowers was a passenger in the front seat and Napoleon Durden was a passenger in the rear seat.

The unit followed the Cutlass for approximately one-half mile. During this time period, the unit learned through the police computer that the license plates on the Cutlass were not registered to that vehicle (the Oldsmobile) but rather to a 1985 Chevrolet.

With this information, the unit stopped the Cutlass, ordered all of the occupants out of the car and conducted a pat-down search on all three individuals. Detective Petrovich, another member of the unit, testified that (1) he was concerned for his safety due to the nature of the neighborhood as a high crime area and (2) the license plate did not correspond with the vehicle in question. The trial court found that after the vehicle was stopped, the police

removed Thomas Pierce's wallet containing over $900 in cash and a pager to receive messages, which were immediately placed on the front hood of the automobile.

After the occupants had been searched, the police questioned Pierce as to the ownership of the vehicle. At this point, Pierce produced an Ohio driver's license in the name of Robert Hale. Pierce later explained that he was a fugitive from the State of Pennsylvania and was trying to evade apprehension and extradition. Pierce told the police that the automobile belonged to his girlfriend Fransheria Cannon and that there was sufficient proof of ownership for the vehicle in the glove compartment.

Upon checking the glove compartment, Detective Petrovich testified that he could not find evidence of ownership. Petrovich stated: "The only thing I did see in the glove box was paperwork from a thirty day tag, which at the time held no relevance because there was no thirty day tag on the car." (Tr. 21, lines 20-26.)

In a further effort to establish ownership of the vehicle, the unit entered the vehicle identification number (VIN) into the police computer. The police computer had no information on file under the vehicle identification number. At this point, Detective Petrovich testified that the police proper procedure under the circumstances is as follows:

> The first thing is to impound the car. You find if there is any documentation in the car. If there is nothing proving ownership or who owns this car, you have to impound the car.

(Tr. 106, lines 8-11.)

Detective Walker testified at length that he too searched the vehicle for documentation to prove ownership of the vehicle. On direct, he responds as follows:

> Q. To whom did you speak?
> A. I spoke to Thomas Pierce.
> Q. What did you talk to Mr. Pierce about?

A. I informed Mr. Pierce that his--that the vehicle he was driving had been pulled over because the plates did not come back listed to the vehicle.

Q. What did he say, if anything, in response to that statement?

A. He stated that the vehicle was in fact a girlfriend [']s of his and that documentation as to such was in the vehicle.

Q. What did you do when he informed you of that?

A. I asked him if I could look in the vehicle for the documentation.

Q. What did he say?

A. He complies (sic) and said I could look.

* * *

Q. At that point did you do anything in order to determine the ownership of the vehicle?

A. Yes, I did.

Q. What did you do?

A. I went to the vehicle and I searched the compartment, the driving compartment, in search of some kind of documentation that would show that the vehicle belonged to, in fact, who the defendant said it was.

Q. Where do you specifically recall searching?

A. I looked inside of the glove box.

* * *

Q. Did you find anything in the glove box that would indicate to you, ownership, or to whom the vehicle may have

belonged?

A. What I found in the glove box was a receipt of some sort for a 30 day tag, and a few cassette tapes.

Q. Now when you say receipt for a 30 day tag, what do you mean by receipt?

A. It appeared at the time that this was--it was some kind of duplication of an application or receipt for a 30 day tag for the State of Ohio.

Q. Do you recall in whose name that receipt was?

A. I do not recall.

Q. Was it significant to you, the document, in terms of establishing ownership or registration of that vehicle?

A. No, sir. It was only the 30 day tag. It wasn't a registration or bill of sale stating that the vehicle belonged to the defendant. Nothing like that.

Q. So other than that particular document, the receipt, you didn't find any other indicia of ownership to that particular vehicle?

A. No, sir.

Q. What did you do at that point in time after you were not convinced or satisfied as to whom the vehicle belonged?

A. I notified my partner that--my partner, Duane Petrovich, that I did not find anything significant as to the ownership of the vehicle, or something that reflected the defendant was the owner

of the vehicle. It was during this time that a tow sheet had been started up.

Q. By whom?

A. By Detective Petrovich.

Q. What is a tow sheet?

A. A tow sheet is a documentation that the Cleveland police uses for our tow unit. It has on it the VIN number of the vehicle, date and time of a request for tow and various other lines that would indicate ownership or who was driving the vehicle at the time of the tow.

Q. Is any other document filled out in conjunction with the tow sheet?

A. In this case, whereas the vehicle was being towed because of fictitious plates, there would also have been--there also exists a section on the tow sheet where you would write down the ticket number and the violation number, along with the muny (sic) code number.

Q. Now when a vehicle is towed in such a circumstance, is there any accounting done of the contents of the vehicle?

A. In all circumstances of a tow, an itemized list of the property within the vehicle has to be documented for not only the safety--or not only the safety of the police officers, but to secure any property that could possibly have been in the vehicle of the owner or the driver of the vehicle.

Q. Is there a particular name for this itemized list?

A. It (sic) a property inventory list.

Q. Who at the scene was responsible for compiling the property inventory?

A. The property inventory was done at this time by myself and Detective McCauley.

Q. Detective Walker, handing you State's Motion Exhibit 1 for identification purposes, would you take a look at that and tell me whether or not you recognize the document?

A. Yes, I do recognize it.

Q. What is that document?

A. That is a Cleveland Police Department Vehicle Tow Authorization Sheet, or duplication of such.

Q. Is that the tow sheet relating to the vehicle that you stopped that particular day?

A. Yes, sir.

Q. Now did you fill out any part of that document?

A. No, I did not.

Q. Do you recognize any of the officers' handwriting from your particular unit on that document?

A. Yes.

Q. Whose handwriting do you recognize?

A. I recognize Detective McCauley's handwriting, and also Detective Petrovich's handwriting.

Q. Now after Detective Petrovich had started the tow sheet, what did you do at that point in time?

A. I remember speaking with the defendant one time before I walked

back to the vehicle, and he stated there was some sort of documentation in the vehicle that would prove who the vehicle belonged to. I asked him again, can I look in the vehicle? And he said, yes.

* * *

Q. Where else did you look further in the vehicle?

A. Well, I looked into the glove box again to see if I overlooked anything, and I looked in various door[s]--within the doors and the seats and things like that, all in the front part of the vehicle. I did not notice anything that would pertain to ownership of the vehicle.

Q. Now at this point in time, were either Detective Petrovich or Detective McCauley involved in inventorying the vehicle?

A. Yes. Detective McCauley was assisting me with--well, she was assisting Detective Petrovich with an inventory of the vehicle while I was still looking for some sort of documentation to prove ownership.

Q. Now during Detective McCauley's inventorying the vehicle, did she find anything, to your knowledge?

A. Yes, sir.

Q. What did she find, to your knowledge?

A. Detective McCauley came upon a loaded .380 automatic. It was underneath the rear right floor mat of the vehicle.

Q. After she located that weapon, what happened with the three occupants, if anything?

A. It was at this time that all the occupants were placed under arrest and advised of their rights.

* * *

Q. Now subsequent to finding that weapon, did you look any further in the vehicle for evidence of ownership?

A. Yes, sir.

Q. Where did you look?

A. I looked further. I looked--gave a more intense search to the front part of the vehicle, and when it was determined there was no--when I determined, myself, there was nothing else that I could search for, nothing else that I could find that I hadn't already discovered, and this tow sheet had been started up and we are going to tow the vehicle because of the gun, I decided I should assist Detective McCauley with a more thorough inventory of the vehicle.

Q. Now you said because you were going to tow the car because of the gun. I thought you were going to tow the car regardless of the gun?

A. Well, yes. Excuse me. We do--we were going to tow the car because of the fictitious plates and we were more emphasized on towing the car because we found the gun. We placed the three occupants under arrest because of the

gun.

Q. At that point in time after the gun was located, they were not free to leave?

A. No, sir.

* * *

BY MR. SHELDON:

Q. They had been placed under arrest at that point?

A. Yes, sir.

Q. Did you personally find anything of evidentiary value upon searching further in the vehicle?

A. Yes, sir.

Q. What did you find?

A. I went into the trunk of the vehicle and it was discovered by myself at that time, a black hip pouch.

Q. How were you able to get inside the trunk?

A. I used the keys from the key ring, from the vehicle.

Q. Can you describe what the black pouch looked like?

A. It was a black hip pouch. They are commonly used to carry items that are a little larger for your wallet and you just don't want to have in your hand. It's a convenience. It's like a purse.

Q. How does it fasten to the hip area?

A. I'm unaware of that.

Q. Did this particular pouch have a zipper or any type of lock?

A. Yes. It had a zipper on it.

Q. Where was the hip pouch situated in the trunk area?

A. It was on the left side of the trunk in plain view.

Q. Was the pouch opened or closed when you observed it in the trunk?

A. It was open, sir.

Q. Did you see anything inside the pouch, in the open pouch, when you looked at it?

A. Yes.

Q. What did you see?

A. I saw a plastic bag.

Q. Did you see anything inside the plastic bag?

A. Yes, upon further examination of it, yes, I did.

Q. What did you see?

A. I pulled the plastic bag out and I discovered it to be a bag of--filled with suspected crack cocaine, and there was other bags of similar standard in there, and each bag I pulled out, each bag contained further contraband. Some bags had suspected crack cocaine and other bags had suspected powder cocaine.

Q. Detective Walker, handing you what's been marked for identification purposes as State's Motion Exhibit 3, of which the contents have been removed, can you take a look at that exhibit and tell me whether or not you recognize it?

A. Yes, I do recognize it.

Q. What is it?

A. This is the hip pouch that was in the trunk of the suspect vehicle.

Q. Is there anything different about the hip pouch, as it sits there today, as when you recovered it on this date, on September 1st?
A. It--yes, there is something different about it.
Q. What's different about it?
A. Well, it doesn't contain the suspected narcotics. Also, it has on it now a badge number of the officer who placed it into our property room.
Q. Is the property envelope there that is was placed into?
A. Yes.

* * *

Q. Now, is the--as the hip pouch sits today, was it open as it is now?
A. Yes.
Q. Was the bag protruding at all from it?
A. Yes, the bags were protruding from this area right in the larger compartment.
Q. THE COURT: I wonder if we could make some estimates about this. I would say this bag seems to be maybe 10 inches long across the top, and maybe seven inches high, with two zipper compartments, and there is a large zipper compartment. Then on the outside of the bag there is a separate smaller zipper compartment?
A. THE WITNESS: Yes, sir.
THE COURT: Where is it that you saw the bags protruding out?
THE WITNESS: The bags were protruding from the larger

compartment.

* * *

Q. Detective Walker, upon examining further the plastic baggies, what did you do, if anything, at that point in time?
A. I notified Detective McCauley, initially, of my discovery, and then I notified the other members of the Street Crimes Unit of my discovery.
Q. Based on your training and experience, what did you suspect the plastic baggie to contain?
A. I suspected several of the bags to contain suspected crack cocaine, and the other bags to contain suspected powder cocaine.
Q. How many bags, in total, do you recall confiscating?
A. I don't recall how many total bags there were.
Q. But all the baggies that you recovered were located inside the leather hip pouch.
A. Yes. Inside the larger compartment of the hip pouch.
Q. Now you mentioned earlier that Detective McCauley had located a weapon in the vehicle.
A. Correct.
Q. How were you alerted to this fact?
A. She told me.
Q. Do you recall what she stated to you when she found the weapon?
A. She said I found a gun. There is a

loaded gun here.

Q. Just so I'm clear, this gun was found after the males had been ordered out of the car and patted down; correct?

A. That's correct.

* * *

Q. Did you, other than finding the suspected cocaine in the trunk, did you locate any other evidence or contraband in the vehicle?

A. There was no more evidence pertaining to the case or contraband pertaining to the case. There was (sic) personal items in the vehicle that are listed on the inventory list.

Q. Did you find any other documentation or indicia of ownership in the trunk area?

A. No, sir.

Q. Did you remain at the scene until a tow truck arrived?

A. The vehicle was driven by Detective -- a detective within the Street Crimes Unit, back to the Justice Center where there was a more thorough inventory, and the tow truck was able to pick it up from there.

Q. Why was this vehicle driven back to the Justice Center.

A. Well, a more thorough inventory of the vehicle could be done.

Q. Now did the officers from your unit, the Street Crimes Unit, participate in the more thorough inventory?

A. Yes, sir.

Q. Do you know if anything, in addition to what was fund at the scene, was recovered upon doing a more thorough inventory?

A. I don't recall anything additional being found.

Q. Now, normally if you requested a tow truck to tow a vehicle, wouldn't you wait for the tow truck to arrive and tow the vehicle?

A. Normally, yes, sir.

Q. Why wasn't that done in this case?

A. Well, given the suspected heightness of the stuff with a loaded weapon and the substantial amount of suspected narcotics, we felt that it would be best we take the vehicle back to the Justice Center where it could be more secured for the protection of the defendant, as well as of the officers.

Q. Now at any time during the stop of this vehicle did the defendant, Thomas Pierce, give you a name of anybody that may be owner of that vehicle?

A. Yes, he did.

Q. Do you recall the name he gave you?

A. As I look[ed] at the tow sheet, he gave a name of Fransheria, I believe her first name was. Cannon is her last name.

THE COURT: What was the last name?

THE WITNESS: Cannon.

* * *

Q. At any point in time during this vehicle stop, during the inventory and search of

the vehicle, did any of the three defendants make any statements regarding ownership of the contraband that was found in the vehicle?

A. Yes, sir.
Q. Which defendant made the statement.
A. That would be Thomas Pierce.
Q. To whom did he make the statement?
A. He made the statement to myself.
Q. When did he make this statement at the scene?
A. Following his rights being read to him.
Q. What did he state to you regarding the evidence that was found in the car?
A. He stated to me that the suspected narcotics and the weapon that was found in the vehicle was his, and that the other two occupants of the vehicle had absolutely nothing to do with it.

(Suppression Hearing Transcript, pp. 137-154.)

Once the decision was made to tow the vehicle, an inventory search was conducted. Detective Roman, another member of the Street Crimes Unit, testified that an inventory search serves three purposes, to protect the police against charges of theft, to protect an individual's personal property and to aid law enforcement. During the inventory search, the unit discovered a loaded .380 caliber handgun under a rear floor mat and an unzipped pouch containing 111.11 grams of powder which later proved to be crack cocaine in the trunk. Upon discovery of the weapon, all three co-defendants (Pierce, Durden and Flowers) were placed under arrest and advised of their rights.

Pierce (a.k.a. Hale) was also given a ticket at the scene for fictitious plates in violation of Cleveland Municipal

Ordinance 435.09(F):

> (f) No person shall park or operate any vehicle upon any public street or highway upon which are displayed any license plates not legally registered and issued for such vehicle, or upon which are displayed any license plates that were issued on an application for registration that contains any false statement by the applicant. (Ord. No. 2822-89. Passed 3-19-90. eff. 3-22-90)

The hearing concluded on January 11, 1994. On January 27, 1994 the trial court granted appellees' motions to suppress illegally obtained evidence. The trial court's ruling incorporated the findings of fact and of law made on the record at the conclusion of the suppression hearing.

The trial court found that the traffic violation, fictitious plates, was used as a justification for stopping and searching appellees and the vehicle for the presence of illegal drugs. The trial court stated:

> The evidence that the police possessed at the time of the search was inadequate to resolve whether the Cutlass was improperly licensed.*** At the same time, the police had information which could have led them to calling either the dealer that sold the car to Ms. Cannon or Ms. Cannon herself. Those calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good faith effort to

conform with R.C. 4503.12(C).

The trial court ruled that appellant failed to demonstrate by a preponderance of the evidence that, at the time of the stop, the vehicle was improperly displaying a fictitious license plate or that the police had made a good faith effort to determine the validity of the tag on the vehicle.

II. ASSIGNMENT OF ERROR

Appellant's first and only assignment of error states:

> THE TRIAL COURT ERRONEOUSLY GRANTED THE DEFENDANTS': THOMAS PIERCE, NAPOLEON DURDEN AND NATHANIEL FLOWERS' [SIC], MOTION TO SUPPRESS EVIDENCE.

Specifically, appellant argues that the trial court erroneously concluded that the Street Crimes Unit failed to make a good faith effort to determine the validity of the license plate in question and, without such good faith effort, did not have reasonable cause to believe that the vehicle was improperly licensed or stolen. Appellant maintains further that the police clearly had probable cause to stop the vehicle and acted reasonably by performing a routine and standard inventory of the contents of the vehicle in accordance with departmental policy.

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution require the police to obtain a warrant based upon probable cause before they conduct a search. However, the warrant requirement is subject to a number of well-established exceptions. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022.

An inventory search of an impounded vehicle is a well-defined exception to the warrant requirement. *Colorado v. Bertine* (1987), 479 U.S. 367, 107 S.Ct. 738. Accordingly, an inventory search of a lawfully impounded

vehicle is valid under the Fourth Amendment when it is performed in good faith, pursuant to standardized police procedure or established routine, and when the evidence does not demonstrate the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle. *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092; *State v. Hathman* (1992), 65 Ohio St.3d 403.

Inventory searches serve to protect the owner's property while it is in police custody; protect police against claims concerning lost or stolen property; and protect police and the public against potential hazards posed by the impounded property. *South Dakota v. Opperman, supra,* at 369. An inventory search "must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." *Florida v. Wells* (1990), 495 U.S. 1, 110 S.Ct. 1632; *State v. Burton* (April 14, 1994), Cuyahoga App. No. 64710, unreported.

Ohio courts have held that if the initial traffic stop was merely a pretext to search for drugs and there was no specific and articulable reason to stop the vehicle to search for drugs, the stop on a pretext of a traffic violation is not permitted; such a stop is a general and unreasonable search that is constitutionally prohibited by both the federal and state constitutions. The test for a pretextual search is whether the police officer under the same circumstances but without the suspicion, would have made the stop. *State v. Spencer* (1991), 75 Ohio App.3d 581, 585. Here the police had a specific and articulable reason to stop the vehicle, an Oldsmobile that had license plates assigned to a Chevrolet.

In a suppression hearing, the state bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App.3d 126. In justifying a particular intrusion, a police

officer must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant the officer's belief that criminal activity has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

In the present case, the Street Crimes Unit followed appellees vehicle because of its improper license plates and its suspicion that the occupants may be engaged in illegal drug activity. Appellees' vehicle was stopped only after the police determined that the license plates were registered to a vehicle other than the Oldsmobile. And even if it were later learned that Municipal Code 435.04(F) (the city ordinance under which Pierce was ticketed) became temporarily suspended under some other ordinance, that fact would not vitiate the legality of the stop. The officers clearly had probable cause to stop the vehicle. Operating a motor vehicle with fictitious license plates is a serious infraction that warranted the stop, particularly in this era of escalating auto thefts.

In addition, after the initial stop was made, the police determined that the driver, Thomas Pierce, who was not the owner and an admitted fugitive with a fake driver's license, was unable to produce vehicle registration, certificate of title or any other proof of ownership. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy.

This court recently addressed a similar issue in the case of *State v. Burton* (April 14, 1994)), Cuyahoga App. No. 64710, unreported. In *Burton*, this court upheld the denial of a motion to suppress evidence where the police initially followed a vehicle based on suspicion that the occupants of the vehicle were engaged in illegal drug

activity. The police did not observe any illegal activity but stopped the vehicle after the license plate was checked and found to be registered to another vehicle as in the present case. This court found that, under the circumstances, any police officer would have been justified in stopping the car "regardless of whether there was a suspicion of drug activity." We held there, as we do here, that the stop was not pretextual and the subsequent impoundment and inventory search of the vehicle were proper.

Similarly, in the case *sub judice*, the record demonstrates that the Street Crimes Unit clearly had probable cause to stop appellees' vehicle. In addition, the fact that appellees were unable to provide them sufficient proof of ownership for the vehicle justified the police officer's subsequent decision to tow the vehicle and conduct an inventory search of its contents.

Appellees maintain that the glove compartment contained a letter from the Ohio Bureau of Motor Vehicles and a copy of the bill of sale for the automobile. The trial court ruled that these documents were present in the glove compartment at the time of the stop based on statements made by Thomas Pierce and Fransheria Cannon even though neither testified that they saw the bill of sale or letter in the car on September 1, 1993, the day of the stop.

The state bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable.

In its findings, the trial court concluded that the state failed to show by a preponderance of the evidence either:

(1) that the vehicle was improperly displaying a particular license. In light of the testimony of Detective Petrovich that he learned through police channels that the Cutlass bore a license assigned to a Chevrolet (and operated by one with a fictitious driver's license and who was not the owner) and carrying a passenger reputed to be

involved with drug trafficking; and admittedly in a high crime area, comprised sufficient justification to warrant a stop. Indeed, in its statement, the lower court conceded that "Before stopping the Cutlass, they (police) learned through the police department computer that the plates on the Cutlass were not registered to that vehicle." or

(2) "that they (police) had made a good-faith effort to determine the validity of the tag *** and after making such a good-faith effort, had reasonable cause to believe that the vehicle was improperly licensed ***."

The police found no evidence of car ownership. When the driver was asked by the (ticketing) officer for identification Pierce produced an Ohio driver license in the name of Robert Hale which Pierce admitted was a fake permit used by Pierce to evade apprehension and extradition resulting from his then status as a fugitive. Pierce had over $900 in his possession and a pager (to receive calls). Pierce claimed that there was evidence of ownership in the glove compartment without disclosing what that evidence was. Both Detective Petrovich and Walker, singly and separately, searched the glove box and found "some kind of duplication of an application of receipt for a 30-day tag of the State of Ohio." Finding no satisfactory evidence of car ownership or identity of driver, Petrovich followed police procedure by impounding the car to inventory it.

In its decision, the lower court wrote "the police had information which could have led them to calling either the dealer that sold the car, or Mrs. Cannon[1] herself. Those

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[1]She admitted that had the police informed her that a male (possessing a driver's license of Robert Hale) indicated that she gave him permission to use the car, she would have responded that she did not give such permission and that she did not know anyone by that name.

calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good faith effort to conform to the law. All of this could have been by radio contacts while the police were at the scene and before the Cutlass was impounded and searched." (Footnote added).

Thus the court sought to impose a duty upon the police as an alternate to impoundment, an issue given attention by the Supreme Court in *Colorado v. Bertine* (1987) 93 L.E.2d 739. The court rejected the idea that the Fourth Amendment mandates the police to prove alternates to impoundment to a vehicle owner. The court explained that "reasonable police regulations relating to inventory procedures administered in good faith satisfies the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." Id. at 747. The court reasoned, that while offering the owner or operator, an alternate was entirely possible, it was not required by the Constitution; and in fact, that approach may not address the legitimate interests of protecting the police, the property or the community.

In short the trial court was applying erroneously its own standard of review, as opposed to determining whether the detectives had probable cause to seize and inventory the vehicle. "In dealing with probable cause *** we deal with probabilities. These are not technical, they are the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar v. United States* (1949), 338 U.S. 160; *Carroll v. United States* (1925), 267 U.S. 132, 164. In issuing its conclusions of law and fact, the trial court imposed its own procedure over that of the officers. To the extent that the court relied on its alternatives to impoundment, its findings are not warranted.

As the court stated in *Illinois v. Gates* (1983), 462 U.S. 229, 230, 231.

The evidence thus collected must be seen and weighed not in terms of arbitrary analysis by scholars, but as understood by those versed in the field of law enforcement.

From this array of evidence, we find included below that the search and seizure was reasonable in the instances that follow:

1. On September 1, 1993 that a Cutlass Oldsmobile, operated by Thomas Pierce, was traveling south on East 71st (toward Superior), a high crime area.

2. The Oldsmobile carried a driver and two passengers: Nathaniel Flowers (in the front passenger seat, hence easily seen) and Napoleon Durden (in the rear seat).

3. Nathaniel Flowers was recognized by Detective Walker (who grew up with Flowers) of the Street Crimes Unit whose major intent is to enforce the state's drug laws. Flowers was reputed to be involved in drug transactions.

4. The officer followed the Oldsmobile and, en route, learned through police department computer that the plates on the Cutlass were registered, not to the 1987 Cutlass, but to a 1985 Chevrolet, thus raising the possibility of a stolen vehicle.

5. The driver of the car identified himself as Thomas Pierce (whose occupation was not revealed) who possessed over $900 in cash and a pager (to receive messages).

6. When an officer approached Pierce for identification, he produced an Ohio driver's license issued to Robert Hale and informed the unit that he had won a motion to quash evidence -- before.

7. After the officer issued a ticket to Robert Hale for improper plates, Pierce disclosed that the Hale license was fictitious and used by Pierce to evade his apprehension

and extradition as a current fugitive from Pennsylvania.

8. In lieu of Pierce's explanation of the Hale license, Pierce was operating a vehicle in Ohio without a valid Ohio driver's license.

9. When officers asked Pierce about the tags on the Oldsmobile, he told them that he had papers in the glove compartment that would straighten out the whole matter.

10. Detective Petrovich then looked in the glove box and then reported, "the only thing I did see in the glove box was paperwork from a 30 day tag on the car.

11. The officers ran the VIN of the Oldsmobile but it came back NIF (not in file).

12. Detective Walker separately and alone searched the glove box and reported that he found a receipt of some sort for a 30 day tag and a few cassette tapes but no evidence of ownership.

13. After Detective Petrovich and Detective Walker checked the glove box and reported that: (a) there was nothing there to establish ownership[2] or (b) registration of the vehicle, (c) nor did they know Fransheria was really Pierce's girlfriend or that (d) she gave Pierce permission to use her car, and (e) since the plates did not come back on the car, an inventory was instituted. The inventors [sic] followed proper procedure, which was necessary to protect the police, the property and the community.

Considering all these factors that became part and parcel of the totality of the circumstances, we conclude that the state successfully bore the burden of proof by

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[2]Fransheria testified that her vehicle -- as impounded -- still contained her indicia of ownership; however, the authorities refused to release the car to her without satisfactory evidence of ownership.

demonstrating that the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App.3d 126.

In the aftermath of the inventory, a loaded gun was found in the vehicle, as well as crack cocaine and cocaine powder discovered in the trunk of the car; all of which were claimed by Pierce.

Accordingly, we sustain appellant's assignment of error that the court erroneously granted defendants' motions to suppress evidence, and reverse and remand for further proceedings.

This cause is reversed and remanded for further proceedings consistent with the opinion herein.

It is, therefore, considered that said appellant recover of said appellees its Common Pleas costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NUGENT, J., CONCURS;
BLACKMON, P.J. DISSENTS
(WITH DISSENTING OPINION.

"s/August Pryatel"
* AUGUST PRYATEL
JUDGE

"s/August Pryatel"
* Judge August Pryatel, Retired Judge of the Eighth Appellate District, sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rules 26). Ten (10) days

from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 66853, 66854, 66855

STATE OF OHIO :
:
Plaintiff-Appellant :
:
-vs- :
: DISSENTING
THOMAS PIERCE :
[CASE NO.66853] :
: OPINION
NAPOLEON DURDEN :
[CASE NO.66854] :
:
NATHANIEL FLOWERS :
[CASE NO.66855] :
:
Defendants-Appellees :

DATE: MAY 25, 1995

BLACKMON, P.J., DISSENTING:

I respectfully dissent from the Majority Opinion. I fundamentally disagree with the Majority's conclusion that the vehicle inventory in this case was reasonable. A reasonable vehicle inventory exists when police officers follow standardized procedures and do not act in bad faith or for the sole purpose of investigation. *Colorado v. Bertine* (1987), 479 U.S. 367.

Here, the issue is not whether the police used standardized procedure during the inventory but whether it was conducted for the sole purpose of investigation.

Colorado v. Bertine recognizes an inventory may be consistent with standardized police procedure but may be thwarted by pretext and subterfuge. Pretext and subterfuge exist when the police conduct a vehicle inventory for the sole purpose of investigation. Consequently, I would have affirmed the trial court's granting of the motion to suppress. I believe a vehicle inventory conducted to excuse a warrantless search offends the Fourth Amendment and is invalid.

In Ohio an investigatory search disguised as a vehicle inventory is illegal. *State v. Caponi* (1984), 12 Ohio St.3d 302. A vehicle inventory was never intended to act as an excuse or justification for a warrantless search. History tells us that a vehicle inventory has been used exclusively as a police procedure to protect the owner's property, to protect the police from claims by owners, and to protect the police from danger. *South Dakota v. Opperman* (1976), 428 U.S. 304.

Therefore, at least one of the *South Dakota v. Opperman* precepts has to be preponderated by the prosecution to justify a vehicle inventory. *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 241. Here the prosecution claimed the impoundment of the Cutlass was necessary because of the officer's belief that it was stolen. The trial court rejected this claim for lack of proof that the car was stolen and further held the prosecution failed to show that its inventory was conducted in good faith or that the inventory lacked investigative intent. According to the trial court, the police were motivated to impound the vehicle to search for contraband.

It reached this conclusion based on the evidence before the officers at the time of the vehicle inventory.

When the officers questioned the driver at the scene about ownership of the Cutlass, the driver pointed to what later became defendants' Exhibits 1 and 2. These Exhibits

showed the owner of the Cutlass and the owner of the Oldsmobile were the same person. The trial court concluded the license plates belonged to her.

The Exhibits also showed the Cutlass was recently purchased and that the owner, Fransheria Cannon, might have been led by the Bureau of Motor Vehicles to believe she could use the Oldsmobile plates on her new Cutlass. The trial court believed the officers, upon learning of Ms. Cannon, could have called her to see if she wanted her vehicle impounded. A reasonable conclusion by the trial court since not all vehicles are in need of vehicle inventory and impoundment when less intrusive means are available.

As a rule reviewing courts are bound to give great deference to the trial court's finding unless, of course, the finding is unreasonable. An unreasonable factual finding exists when the record is devoid of facts to support the historical fact found by the trial court. The historical facts found by the court were the officers knew the owner of both the Oldsmobile and the Cutlass was the same, knew that the driver had knowledge of her, and knew he claimed to have her permission to use the car. This the court found sufficient to negate the claim that the car was stolen. Without the stolen car justification, the officers are susceptible to the charge that their investigatory intent motivated them to inventory the car.

A pretextual or disguised investigatory search depends upon whether a reasonable police officer confronted with ordinary reasonable suspicion of a minor traffic offense would have chosen under the circumstances to proceed with making an inventory in the absence of an improper motive. A vehicle inventory is pretextual if police use a legal justification for making the inventory to search for evidence of unrelated crimes without probable cause or reasonable suspicion. *State v. Richardson* (1994), 94 Ohio App.3d 501.

In applying the *State vs. Richardson* test to this case, it is certain that, absent the bad motive, a reasonable police officer would have arrested the defendant for no driver's license, allowed the passengers to leave, and informed the owner, Fransheria Cannon, where her car was located.

Moreover, absent the motive to search for drugs, a reasonable police officer would have allowed one of the passengers to operate the vehicle and would have taken the driver into custody for failure to have an operator's license. Every day on the streets of Cleveland this practice is adhered to by the police. It is not a novel idea or some outlandish procedure.

A reasonable police officer would not have concluded the car was stolen when the overwhelming information given at the scene was that the car belonged to Cannon, an acquaintance of the driver. Even if the police chose not to read the letter from the Bureau of Motor Vehicles regarding the owner's license plates, the officer knew Cannon was the owner of both cars from the license plate check.

A reasonable police officer would have accepted the driver's explanation of ownership of the car, would have arrested the driver for no license, and would not have impounded the car for such a minor traffic issue. Unless, of course, the bad motive controlled the officers' conduct.

Here, the officers admitted they pursued the vehicle because one of their fellow officers had said the passenger was a drug dealer. The officers themselves were part of a specialized drug unit whose job was to search for evidence of drugs. Before they pursued the car, the object of their attention was a parked vehicle that they were searching for drugs. These facts lead to but one conclusion - they were searching for drugs when they inventoried the Cutlass. The appellate courts in Ohio have held a vehicle inventory invalid when the state argued the basis for the inventory was because the car might have been stolen and the

testifying officer contradicted the state's offered proof by admitting he was looking for drugs. *State v. Bailey* No. (November 3, 1989), Wood App. No. WD-89-15, unreported. When an officer is motivated by the purpose to investigate under *Colorado v. Bertine* such a motive will taint the vehicle inventory.

Clearly, cases this nature are inherently difficult. Difficult because they often benefit the wrongdoer in ways that make us uncomfortable. However, it is the Constitution that should relieve us of our anxiety. Because it is the Constitution that demands and compels the police to act reasonably. As such, we should all be alarmed when a vehicle inventory is not used to protect property or the police but to furnish the basis for a warrantless search. Accordingly, I would have affirmed the trial court's suppression of the evidence.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

STATE OF OHIO

Appellant — COURT OF APPEALS NO. 66853, 66854, 66855

-VS-

LOWER COURT NO. CP CR-301570
COMMON PLEAS COURT

THOMAS PIERCE

Appellee — MOTION NO. 63588

Date 06/13/95

Journal Entry

MOTION BY APPELLEE FOR RECONSIDERATION IS OVERRULED.

DONALD C. NUGENT, J., CONCURS

PATRICIA A. BLACKMON, J., DISSENTS

"s/August Pryatel"
Presiding Judge
AUGUST PRYATEL, RET.

THE SUPREME COURT OF OHIO

1995 TERM

To wit: November 15, 1995

State of Ohio, Appellee,	:	Case No. 95-1512
v.	:	ENTRY
Thomas Pierce, Napoleon Durden, Nathaniel Flowers, Appellants.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by James R. Willis.

(Cuyahoga County Court of Appeals; Nos., 66853 & 66854)

"s/Thomas J. Moyer"
THOMAS J. MOYER
Chief Justice

STATE OF OHIO	)	IN THE COURT
	)	OF COMMON PLEAS
	) ss:	
CUYAHOGA	)	
COUNTY	)	CASE NO. CR-301570

STATE OF OHIO	)	
	)	
Plaintiff	)	
	)	
v.	)	RULING ON MOTION TO SUPPRESS
	)	
	)	
NAPOLEON E. DURDEN,	)	
THOMAS PIERCE and	)	
NATHANIEL I. FLOWERS	)	
	)	
Defendants	)	

Burt W. Griffin, J.:

On September 1, 1993, the Street Crimes Unit of the Cleveland Police Department was investigating a parked vehicle on East 71st Street not too far from St. Clair. The car was suspected of being used in the drug trade.

The major activity of the Street Crimes Unit is to enforce the State's drug laws. Seventy-five percent or more of their time is directed toward drug law enforcement.

The unit has approximately fifteen members and deploys itself in sufficiently large numbers to be able to outnumber and overpower any people who might be suspected of trafficking in drugs.

On this particular occasion, eight members of the unit

were investigating a parked automobile in connection with a suspected drug offense. They saw a different car, the automobile in question in this case, a 1987 Oldsmobile Cutlass, being driven along East 71st Street. All of the officers at that point were out of their own vehicles and either on the side of the street or in the sidewalk area.

Detective Walker, a member of the Street Crimes Unit, noticed that one of the occupants in the Cutlass was the defendant, Nathaniel Flowers, whom he had known since their childhood, and whom he believed in good faith was a person who was involved in the drug trade. That information came from female social acquaintances.

Because of that belief, he alerted his fellow officers. They abandoned what they were doing with respect to the parked motor vehicle, got into their automobiles, and proceeded to follow the Cutlass, which was being driven by defendant Thomas Pierce. Defendant Flowers was a passenger in the front seat, and defendant Durden was in the back seat.

They followed the Cutlass for approximately a half mile to an area near Superior or Addison Road. Before stopping the Cutlass, they learned through the police department computer that the plates on the Cutlass were not registered to that vehicle.

Based on that information, the police stopped the vehicle, ordered all of the occupants out of the car, and proceeded first to search them. The police took Mr. Pierce's wallet out of his pocket and put it on the front hood of the car. They popped the front hood. All of this occurred simultaneously and instantaneously after the car was stopped.

Once the car's occupants were so secured, the police asked Mr. Pierce about the car. Pierce told them that there was identification for the ownership of the car in the car's glove compartment. He gave them the name of the car's

owner--his girlfriend.

Defendant's Exhibit I, which is an envelope, defendants' Exhibit I-1, which is a letter from the Ohio Bureau of Motor Vehicles, and defendants' Exhibit I-2, which is the purchaser's copy of the bill of sale for the vehicle, all were in the glove compartment.

Those items were secured by the car's owner in the routine course of purchasing the automobile two weeks before, on August 17, 1993.

Exhibit I-1 is a letter from Mitchell J. Brown, registrar, motor vehicles, sent to Southland Chevrolet, 2810 Bishop Road in Willoughby Hills. The Court infers from these documents that they were all given to Fransheria Cannon at the time she purchased the Cutlass on August 17th and that she believed that such documentation was satisfactory evidence that she was entitled to operate this car with the plates from her prior motor vehicle.

The police apparently did not care to look at this information. They had information from their computer that registration of the license plates had not been officially transferred to this car. So they proceeded then to search the Cutlass in the way that has been described by the State's witness and to find drugs and a gun.

The gun was not out in the open but under the floor mats as described by Mr. Pierce.

It is clear to the Court that the suspected traffic violation -- driving with allegedly improper plates -- was used as a justification for stopping and searching the vehicle and its occupants, although the primary police purpose was to search for illegal drugs. The investigation began because the defendant, Nathaniel Flowers, was a drug suspect and not because the police were intent on enforcing the motor vehicle laws.

The State has not demonstrated by a preponderance of the evidence, however, that the Cutlass was improperly

licensed. Indeed, R.C. §4503.12(C) and the documents found in the car's glove compartment suggest that the owner, Ms. Cannon, may have been fully entitled to display the plates from her previously owned vehicle on the recently purchased Cutlass.

The evidence that the police possessed at the time of the search was inadequate to resolve whether the Cutlass was improperly licensed. A check of the car's VIN number simply showed "NIF," no information in the police's computer. At the same time, the police had information which could have led them to calling either the dealer that sold the car to Ms. Cannon or Ms. Cannon herself. Those calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good-faith effort to conform with R.C. §4503.12(C). All of this could have been by radio contact while the police were at the scene and before the Cutlass was searched.

The credible evidence does not indicate that the police were investigating a possibly stolen car or, indeed, that they believed at the time that the Cutlass was probably stolen. The evidence is abundantly clear that the police believed they were on the trail of drug traffickers and that they were using the possibility of a motor vehicle violation as a basis for seizing and searching the Cutlass.

But the burden is on the State to demonstrate by a preponderance of the evidence either that the vehicle, at the time, was improperly displaying a particular license tag or that they had made a good-faith effort to determine the validity of the tag on the vehicle and, after having made such good-faith effort, had reasonable cause to believe that the vehicle was improperly licensed or stolen. Cf.*State v. Caponi* (1984), 12 Ohio St. 3d 302. Since the State has not demonstrated any of those essential factors by a preponderance of the evidence, the motion to suppress should be granted. Cf. *Ybarra v. Illinois* (1979), 444 U.S.

The motion to suppress is granted. Trial is set for February 9, 1994 at 9:00 a.m.

"s/Burt W. Griffin"
BURT W. GRIFFIN, JUDGE

DATE: JANUARY 26, 1994

NOTICE OF SERVICE

A copy of the foregoing Ruling was sent by Ordinary U.S. mail this 26th day of January, 1994, to: David C. Sheldon, Esq., Assistant County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113; James R. Willis, Esq., Suite 350, Courthouse Square Building, 310 Lakeside Avenue, N.W., Cleveland, Ohio 44113; Donald Butler, Esq., 75 Public Square, Cleveland, Ohio 44113.

"s/ Burt W. Griffin"
BURT W. GRIFFIN, JUDGE

(3)

NO. 95-1771

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THOMAS PIERCE

Petitioner

-vs-

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHANIE TUBBS JONES (#0015495)
Cuyahoga County Prosecutor

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record are more properly stated as follows:

I. WHETHER THE TRIAL COURT ERRED WHEN IT SOUGHT TO IMPOSE AN ADDITIONAL DUTY UPON THE POLICE AS AN ALTERNATIVE TO AN IMPOUND SEARCH RATHER THAN DETERMINING WHETHER THE POLICE HAD PROBABLE CAUSE TO SEIZE AND CONDUCT AN INVENTORY SEARCH OF THE VEHICLE.

II. WHETHER AN APPELLATE COURT HAS THE AUTHORITY TO REJECT ERRONEOUS TRIAL COURT'S FINDINGS WHICH ARE CONTRARY TO LAW SINCE THE TRIAL COURT SOUGHT TO CREATE ALTERNATIVES TO AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE. SEE, COLORADO V. BERTINE (1987), 479 U.S. 367.

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OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which could require this Court to review this case.

The Ohio courts decided this case in accordance with the Constitution of the United States, the Ohio Constitution and the applicable decisions of this Court.

No substantial federal question is presented by the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Court of Appeals, Eighth Judicial District, reversed the trial court's granting of petitioner's Motion to Suppress Evidence.

Likewise, the Ohio Supreme Court declined jurisdiction, finding no substantial constitutional question presented for review.

STATEMENT OF THE FACTS

On November 2,1993, petitioner, Thomas Pierce, and two companions, Napoleon Durden and Nathaniel Flowers, were indicted by the Cuyahoga County Grand Jury in a six count indictment for Receiving Stolen Property, in violation of R.C. §2913.51; Carrying a Concealed Weapon, in violation of R.C. §2923.12; Possession of a Controlled Substance, to-wit: cocaine, in violation of R.C. §2925.03; Preparation of a Controlled Substance for Shipment, in violation of R.C. §2925.03; Use of a Motor Vehicle for the Commission of a Felony Drug Abuse, in violation of R.C. §2925.13; and Possession of Criminal Tools, in violation of R.C. §2923.24.

On November 24, 1993, petitioner and Nathaniel Flowers were arraigned whereupon each entered a plea of not guilty to the indictment. On December 8, 1993, Napoleon Durden was arraigned whereupon he also entered a plea of not guilty to the indictment.

Petitioner filed a Motion to Suppress illegally obtained evidence. On January 7, 1994, the trial court held a hearing on petitioner's Motions to Suppress.

During the hearing, the following facts were developed. On September 1, 1993, the Street Crimes Unit of the Cleveland Police Department was investigating an illegally parked vehicle near the intersection of East 71st Street and St. Clair. The unit suspected that the parked vehicle was involved in the sale and/or transportation of illegal drugs.

The Street Crimes Unit's main responsibility is the enforcement of the drug laws of the State of Ohio. The unit is comprised of approximately 15 members who generally deploy themselves in numbers large enough to outnumber and overpower any resistance of people the unit may encounter who are suspected of drug trafficking.

On the date in question, eight members of the unit were investigating an automobile illegally parked from the curb when they observed a second automobile, a 1987 Oldsmobile Cutlass, begin driven south along East 71st Street.

Detective Walker of the Street Crimes Unit noticed that one of the passengers in the Cutlass was Nathaniel Flowers, whom he had known since childhood. Walker testified that he had received certain information linking Flowers to the sale of illegal drugs.

Based on Walker's belief, the unit left its investigation of the parked automobiles and proceeded to follow the Cutlass. Petitioner was operating the automobile, Flowers was a passenger in the front seat, and Napoleon Durden was a passenger in the rear seat.

The unit followed the Cutlass for approximately one-half mile. During this time period, the unit learned through the police computer that the license plates on the Cutlass were not registered to that vehicle (the Oldsmobile), but rather to a 1985 Chevrolet.

With this information, the unit stopped the Cutlass, ordered all of the occupants out of the car, and conducted a pat-down search on all three individuals. Detective Petrovich, another member of the unit, testified that (1) he was concerned for his safety due to the nature of the neighborhood as a high crime area, and (2) the license plate did not correspond with the vehicle in question. The trial court found that after the vehicle was stopped, the police removed petitioner's wallet containing over $900 in cash and a pager to receive messages, which were immediately placed on the front hood of the automobile.

After the occupants had been searched, the police questioned petitioner as to the ownership of the vehicle. At this point, petitioner produced an Ohio driver's license in the name of Robert Hale. Petitioner later explained that he was a fugitive from the State of Pennsylvania and was trying to evade apprehension and extradition. Petitioner told the police that the automobile belonged to his girlfriend, Fransheria Cannon, and that there was sufficient proof of ownership for the vehicle in the glove compartment.

Upon checking the glove compartment, Detective Petrovich testified that he could not find evidence of ownership. Petrovich stated: "The only thing I did see in the glove box was paperwork from a 30 day tag, which at the time held no relevance because

there was no 30 day tag on the car."

In a further effort to establish ownership of the vehicle, the unit entered the vehicle identification number (VIN) into the police computer. The police computer had no information on file under the vehicle identification number. At this point, Detective Petrovich testified that the police proper procedure under the circumstances is as follows:

> The first thing is to impound the car. You find if there is any documentation in the car. If there is nothing proving ownership or who owns this car, you have to impound the car.

Detective Walker testified at length that he too searched the vehicle for documentation to prove ownership of the vehicle. On direct, he responds as follows:

Q. What did you do when he informed you of that?
A. I asked him if I could look in the vehicle for the documentation.
Q. What did he say?
A. He complies (sic) and said I could look.

* * *

Q. At that point did you do anything in order to determine the ownership of the vehicle?
A. Yes, I did.
Q. What did you do?

A. I went to the vehicle and I searched the compartment, the driving compartment, in search of some kind of documentation that would show that the vehicle belonged to, in fact, who the defendant said it was.
Q. Where do you specifically recall searching?
A. I looked inside of the glove box.

* * *

Q. Did you find anything in the glove box that would indicate to you, ownership, or to whom the vehicle may have belonged?
A. What I found in the glove box was a receipt of some sort for a 30 day tag, and a few cassette tapes.
Q. Now when you say receipt for a 30 day tag, what do you by receipt?
A. It appeared at the time that this was it was some kind of duplication of an application or receipt for a 30 day tag for the State of Ohio.
Q. Do you recall in whose name that receipt was?
A. I do not recall.
Q. Was it significant to you, the document, in terms of

establishing ownership or registration of that vehicle?

A. No, sir. It was only the 30 day tag. It wasn't a registration or bill of sale stating that the vehicle belonged to the defendant. Nothing like that.

Q. So other than that particular document, the receipt, you didn't find any other indicia of ownership to that particular vehicle?

A. No, sir.

Q. What did you do at that point in time after you were not convinced or satisfied as to whom the vehicle belonged?

A. I notified my partner that -- my partner, Duane Petrovich, that I did not find anything significant as to the ownership of the vehicle, or something that reflected the defendant was the owner of the vehicle. It was during this time that a tow sheet had been started up.

Q. By whom?

A. By Detective Petrovich.

Q. What is a tow sheet?

A. A tow sheet is a documentation that the Cleveland police uses for our tow unit. It has on it the

VIN number of the vehicle, date and time of a request for tow and various other lines that would indicate ownership or who was driving the vehicle at the time of the tow.

Q. Is any other document filled out in conjunction with the tow sheet?

A. In this case, whereas the vehicle was being towed because of fictitious plates, there would also have been -- there also exists a section of the tow sheet where you would write down the ticket number and the violation number, along with the muny (sic) code number.

Q. Now when a vehicle is towed in such a circumstance, is there any accounting done of the contents of the vehicle?

A. In all circumstances of a tow, an itemized list of the property within the vehicle has to be documented for not only the safety -- or not only the safety of the police officers, but to secure any property that could possibly have been in the vehicle of the owner or the driver of the vehicle.

Q. Is there a particular name for this itemized list?

A. It (sic) a property inventory list.

Q. Who at the scene was responsible for compiling the property inventory?

A. The property inventory was done at this time by myself and Detective McCauley.

Q. Detective Walker, handing you State's Motion Exhibit 1 for identification purposes, would you take a look at that and tell me whether or not you recognize the document?

A. Yes, I do recognize it.

Q. What is that document?

A. That is a Cleveland Police Department Vehicle Tow Authorization Sheet, or duplication of such.

Q. Is that the tow sheet relating to the vehicle that you stopped that particular day?

A. Yes, sir.

Q. Now did you fill out any part of that document?

A. No, I did not.

Q. Do you recognize any of the officers' handwriting from your particular unit on that document?

A. Yes.

Q. Whose handwriting do you recognize?

A. I recognize Detective McCauley's handwriting, and also Detective Petrovich's handwriting.

Q. Now after Detective Petrovich had started the tow sheet, what did you do at that point in time?

A. I remember speaking with the defendant one time before I walked back to the vehicle, and he stated there was some sort of documentation in the vehicle that would prove who the vehicle belonged to. I asked him again, can I look in the vehicle? And he said yes.

* * *

Q. Where else did you look further in the vehicle?

A. Well, I looked into the glove box again to see if I overlooked anything, and I looked in various door[s] -- within the doors and the seats and things like that, all in the front part of the vehicle. I did not notice anything that would pertain to ownership of the vehicle.

Q. Now at this point in time, were either Detective Petrovich or Detective McCauley involved in inventorying the vehicle?

A. Yes. Detective McCauley was assisting me with -- well, she was assisting Detective Petrovich with an inventory of the vehicle while I was still looking for some sort of documentation to prove ownership.

Q. Now during Detective McCauley's inventorying the vehicle, did she find anything, to your knowledge?

A. Yes, sir.

Q. What did she find, to your knowledge?

A. Detective McCauley came upon a loaded .380 automatic. It was underneath the rear right floor mat of the vehicle.

Q. After she located that weapon, what happened with the three occupants, if anything?

A. It was at this time that all the occupants were placed under arrest and advised of their rights.

* * *

Q. Now subsequent to her finding that weapon, did you

look any further in the vehicle for evidence of ownership?

A. Yes, sir.

Q. Where did you look?

A. I looked further. I looked -- gave a more intense search to the front part of the vehicle, and when it was determined there was no -- when I determined, myself, there was nothing else that I could search for, nothing else that I could find that I hadn't already discovered, and this tow sheet had been started up and we are going to tow the vehicle because of the gun, I decided I should assist Detective McCauley with a more thorough inventory of the vehicle.

Q. Now you said because you were going to tow the car because of the gun. I thought you were going to tow the car regardless of the gun?

A. Well, yes. Excuse me. We do -- we were going to tow the car because of the fictitious plates and we were more emphasized on towing the car because we found the gun. We placed the three occupants under arrest

because of the gun.

Q. At that point in time after the gun was located, they were not free to leave?

A. No, sir.

* * *

BY MR. SHELDON:

Q. They had been placed under arrest at that point?

A. Yes, sir.

Q. Did you personally find anything of evidentiary value upon searching further in the vehicle?

A. Yes, sir.

Q. What did you find?

A. I went into the trunk of the vehicle and it was discovered by myself at that time, a black hip pouch.

Q. How were you able to get inside the trunk?

A. I used the keys from the key ring, from the vehicle.

Q. Can you describe what the black pouch looked like?

A. It was a black hip pouch. They are commonly used to carry items that are a little larger for your wallet and you just don't want to have in your hand. It's a convenience. It's like a

purse.

Q. How does it fasten to the hip area?

A. I'm unaware of that.

Q. Did this particular pouch have a zipper or any type of lock?

A. Yes. It had a zipper on it.

Q. Where was the hip pouch situated in the trunk area?

A. It was on the left side of the trunk in plain view.

Q. Was the pouch opened or closed when you observed it in the trunk?

A. It was open, sir.

Q. Did you see anything inside the pouch, in the open pouch, when you looked at it?

A. Yes.

Q. What did you see?

A. I saw a plastic bag.

Q. Did you see anything inside the plastic bag?

A. Yes, upon further examination of it, yes, I did.

Q. What did you see?

A. I pulled the plastic bag out and I discovered it to be a bag of -- filled with suspected crack cocaine, and there was other bags of similar standard in there, and each bag I pulled out, each bag contained further contraband.

Some bags had suspected crack cocaine and other bags had suspected powder cocaine.

Q. Detective Walker, handing you what's been marked for identification purposes as State's Motion Exhibit 3, of which the contents have been removed, can you take a look at that exhibit and tell me whether or not you recognize it?

A. Yes, I do recognize it.

Q. What is that?

A. This is the hip pouch that was in the trunk of the suspect vehicle.

Q. Is there anything different about the hip pouch, as it sits there today, as when you recovered it on this date, on September 1st?

A. It -- yes, there is something different about it.

Q. What's different about it?

A. Well, it doesn't contain the suspected narcotics. Also, it has on it now a badge number of the officer who placed it into our property room.

Q. Is the property envelope there that it was placed into?

A. Yes.

* * *

Q. Now, is the -- as the hip pouch sits there today, was it open as it is now?

A. Yes.

Q. Was the bag protruding at all from it?

A. Yes, the bags were protruding from this area right in the larger compartment.

THE COURT: I wonder if we could make some estimates about this. I would say this bag seems to be maybe 10 inches long across the top, and maybe seven inches high, with two zipper compartments, and there is a large zipper compartment. Then on the outside of the bag there is a separate smaller zipper compartment?

THE WITNESS: Yes, sir.

THE COURT: Where is it that you saw the bags protruding out?

THE WITNESS: The bags were protruding from the larger compartment.

* * *

Q. Detective Walker, upon examining further the plastic baggies, what did you do, if anything, at that point in time?

A. I notified Detective McCauley, initially, of my discovery, and then I notified the other members of the Street Crimes Unit of my discovery.

Q. Based on your training and experience, what did you suspect the plastic baggie to contain?

A. I suspected several of the bags to contain suspected crack cocaine, and the other bags to contain suspected powder cocaine.

Q. How many bags, in total, do you recall confiscating?

A. I don't recall how many total bags there were.

Q. But all the baggies that you recovered were located inside the leather hip pouch?

A. Yes. Inside the larger compartment of the hip pouch.

Q. Now you mentioned earlier that Detective McCauley had located a weapon in the vehicle?

A. Correct.

Q. How were you alerted to this fact?

A. She told me.

Q. Do you recall what she stated to you when she found the

weapon?

A. She said I found the gun. There is a loaded gun here.

Q. Just so I'm clear, this gun was found after the males had been ordered out of the car and patted down; correct?

A. That's correct.

* * *

Q. Did you, other than finding the suspected cocaine in the trunk, did you locate any other evidence or contraband in the vehicle?

A. There was no more evidence pertaining to the case or contraband pertaining to the case. There was (sic) personal items in the vehicle that are listed on the inventory sheet.

Q. Did you find any other documentation or indicia of ownership in the trunk area?

A. No, sir.

Q. Did you remain at the scene until a tow truck arrived?

A. The vehicle was driven by Detective -- a detective within the Street Crimes Unit, back to the Justice Center where there was a more thorough inventory, and the tow truck was able to pick it up from

there.

Q. Why was this vehicle driven back to the Justice Center?

A. Well, a more thorough inventory of the vehicle could be done.

Q. Now did the officers from your unit, the Street Crimes Unit, participate in the more thorough inventory?

A. Yes, sir.

Q. Do you know if anything, in addition to what was found at the scene, was recovered upon doing a more thorough inventory?

A. I don't recall anything additional being found.

Q. Now, normally if you requested a tow truck to tow a vehicle, wouldn't you wait for the tow truck to arrive and tow the vehicle?

A. Normally, yes, sir.

Q. Why wasn't that done in this case?

A. Well, given the suspected heightness of the stuff with a loaded weapon and the substantial amount of suspected narcotics, we felt that it would be best we take the vehicle back to the Justice Center where it could be more secured for the

protection of the defendant, as well as of the officers.

Q. Now at any time during the stop of this vehicle did the defendant, Thomas Pierce, give you a name of anybody that may be owner of that vehicle?

A. Yes, he did.

Q. Do you recall the name he gave you?

A. As I look[ed] at the tow sheet, he gave a name of Franksheria, I believe her first name was. Cannon is her last name.

THE COURT: What was the last name?

THE WITNESS: Cannon.

* * *

Q. At any point in time during this vehicle stop, during the inventory and search of the vehicle, did any of the three defendants make any statements regarding ownership of the contraband that was found in the vehicle?

A. Yes, sir.

Q. Which defendant made the statement?

A. That would be Thomas Pierce.

Q. To whom did he make the statement?

A. He made the statement to myself.

Q. When did he make this statement at the scene?

A. Following his rights being read to him.

Q. What did he state to you regarding the evidence that was found in the car?

A. He stated to me that the suspected narcotics and the weapon that was found in the vehicle was his, and that the other two occupants of the vehicle had absolutely nothing to do with it.

(Suppression Hearing Transcript, pp. 137-154.)

Once the decision was made to tow the vehicle, an inventory search was conducted. Detective Roman, another member of the Street Crimes Unit, testified that an inventory search serves three purposes: (1) to protect the police against charges of theft; (2) to protect an individual's personal property; and (3) to aid law enforcement. During the inventory search, the unit discovered a loaded .380 caliber handgun under a rear floor mat and an unzipped pouch containing 111.11 grams of powder which later proved to be crack cocaine in the trunk. Upon discovery of the weapon, all three co-defendants (Pierce, Durden and Flowers) were placed under arrest and advised of their rights.

Pierce (a.k.a. Hale) was also given a ticket at the scene for fictitious plates in violation of Cleveland Municipal Ordinance 435.09(F):

(F) No person shall park or operate any vehicle upon any public street or highway upon which are displayed any license plates not legally registered and issued for such vehicle, or upon which are displayed any license plates that were issued on an application for registration that contains any false statement by the applicant. (Ord. No. 2822-89. Passed 3-19-90. eff. 3-22-90.)

The hearing concluded on January 11, 1994. On January 27, 1994, the trial court granted petitioner's Motion to Suppress illegally obtained evidence. The trial court's ruling incorporated the Findings of Fact and Conclusions of Law made on the record at the conclusion of the suppression hearing.

The trial court found that the traffic violation, fictitious plates, was used as a justification for stopping and searching petitioner and the vehicle for the presence of illegal drugs. The trial court stated:

The evidence that the police possessed at the time of the search was inadequate to resolve whether the Cutlass was improperly licensed. * * *At the same time, the police had information which could have led them to calling either the dealer that sold the car to Ms. Cannon or Ms. Cannon herself. Those calls could have confirmed that the license which was on the Cutlass had been properly placed there in good faith effort to

conform with R.C. 4503.12(C).

The trial court ruled that the State failed to demonstrate by a preponderance of the evidence that, at the time of the stop, the vehicle was improperly displaying a fictitious license plate or that the police had made a good faith effort to determine the validity of the tag on the vehicle.

REASONS FOR DENYING THE WRIT

I. THE TRIAL COURT ERRED WHEN IT SOUGHT TO IMPOSE AN ADDITIONAL DUTY UPON THE POLICE AS AN ALTERNATIVE TO AN IMPOUND SEARCH RATHER THAN DETERMINING WHETHER THE POLICE HAD PROBABLE CAUSE TO SEIZE AND CONDUCT AN INVENTORY SEARCH OF THE VEHICLE.

II. AN APPELLATE COURT HAS THE AUTHORITY TO REJECT ERRONEOUS TRIAL COURT'S FINDINGS WHICH ARE CONTRARY TO LAW, COLORADO V. BERTINE (1987), 479 U.S. 367, SINCE THE TRIAL COURT SOUGHT TO CREATE ALTERNATIVES TO AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE.

Petitioner's argument that the trial court's disregard of Colorado v. Bertine (1987), 479 U.S. 367, to the extent that less intrusive measures might be available to achieve an inventory search, is somehow justified. This Court rejected that argument in Bertine and should reject the argument made in this case.

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, require the police to obtain a warrant based upon probable cause before they conduct a search. However, the warrant requirement is subject to a number of well-established exceptions. Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S. Ct. 2022.

An inventory search of an impounded vehicle is a well-defined exception to the warrant requirement. Colorado v. Bertine, supra. Accordingly, an inventory search of a lawfully impounded vehicle is valid under the Fourth Amendment when it is performed in good faith, pursuant to standardized police procedure or established routine, and when the evidence does not demonstrate the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle. South Dakota v. Opperman (1976), 428 U.S. 364, 96 S. Ct. 3092; State v. Hathman (1992), 65 Ohio St. 3d 403.

Inventory searches serve to protect the owner's property while it is in police custody; protect police against claims concerning lost or stolen property; and protect police and the public against potential hazards posed by the impounded property. South Dakota v. Opperman, supra, at 369. An inventory search "must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." Florida v. Wells (1990), 495 U.S. 1, 110 S. Ct. 1632.

Ohio courts have held that if the initial traffic stop was merely a pretext to search for drugs and there was no specific and articulable reason to stop the vehicle to search for drugs, the stop on a pretext of a traffic violation is not permitted; such a stop is a general and unreasonable search that is constitutionally prohibited by both the federal and state constitutions. The test for a pretextual search is whether the police officer, under the same circumstances but without the suspicion, would have made the stop. State v. Spencer (1991), 75 Ohio App. 3d 581, 585. Here the police had a specific and articulable reason to stop the vehicle, an Oldsmobile that had license plates assigned to a Chevrolet.

In a suppression hearing, the State bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable. State v. Bevan (1992), 80 Ohio App. 3d 126. In justifying a particular intrusion, a police officer must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant the officer's belief that criminal activity has occurred or is imminent. Terry v. Ohio (1968), 392 U.S. 1.

In the present case, the Street Crimes Unit followed petitioner's vehicle because of its improper license plates and its suspicion that the occupants may be engaged in illegal drug activity. Petitioner's vehicle was stopped only after the police determined that the license plates were registered to a vehicle other than the Oldsmobile. And even if it were later learned that Municipal Code 435.04(F) (the city ordinance under which petitioner was ticketed) became temporarily suspended under some other ordinance, that fact would not vitiate the legality of the stop. The officers clearly had probable cause to stop the vehicle. Operating a motor vehicle with fictitious license plates is a serious infraction that warranted the stop, particularly in this era of escalating auto thefts.

In addition, after the initial stop was made, the police determined that the driver, petitioner, who was not the owner and an admitted fugitive with a fake driver's license, was unable to produce vehicle registration, certificate of title or any other proof of ownership. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy.

In the case sub judice, the record demonstrates that the Street Crimes Unit clearly had probable cause to stop petitioner's vehicle. In addition, the fact that petitioner was unable to provide them sufficient proof of ownership for the vehicle justified the police officer's subsequent decision to tow the vehicle and conduct an inventory search of its contents.

Petitioner maintains that the glove compartment contained a letter from the Ohio Bureau of Motor Vehicles and a copy of the Bill of Sale for the automobile. The trial court ruled that these documents were present in the glove compartment at the time of the stop based on statements made by petitioner and Fransheria Cannon even though neither testified that they saw the Bill of Sale or letter in the car on September 1, 1993, the day of the stop.

The State bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable.

In its findings, the trial court concluded that the State failed to show by a preponderance of the evidence either:

(1) that the vehicle was improperly displaying a particular license. In light of the testimony of Detective Petrovich that he learned through police channels that the Cutlass bore a license assigned to a Chevrolet (and operated by one with a fictitious

driver's license and who was not the owner) and carrying a passenger reputed to be involved with drug trafficking; and admittedly in a high crime area, comprised sufficient justification to warrant a stop. Indeed, in its statement, the lower court conceded that, "Before stopping the Cutlass, they (police) learned through the police department computer that the plates on the Cutlass were not registered to that vehicle." Or

(2) "that they (police) had made a good-faith effort to determine the validity of the tag* * *and after making such good-faith effort, had reasonable cause to believe that the vehicle was improperly licensed* * *."

The police found no evidence of car ownership. When the driver was asked by the (ticketing) officer for identification, petitioner produced the Ohio driver's license in the name of Robert Hale, which petitioner admitted was a fake permit used by petitioner to evade apprehension and extradition resulting from his then status as a fugitive. Petitioner had over $900 in his possession and a pager (to receive calls). Petitioner claimed that there was evidence of ownership in the glove compartment without disclosing what that evidence was. Both Detectives Petrovich and Walker, singly and separately, searched the glove box and found "some kind of duplication of an application of receipt for a 30-day tag of the State of Ohio." Finding no satisfactory evidence of car ownership or identity of driver, Petrovich followed police procedure by impounding the car to inventory it.

In its decision, the lower court wrote, "the police had information which could have led them to calling either the dealer

that sold the car, or Mrs. Cannon[1] herself. These calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good-faith effort to conform to the law. All of this could have been by radio contacts while the police were at the scene and before the Cutlass was impounded and searched." (Footnote added).

Thus, the court sought to impose a duty upon the police as an alternate to impoundment, an issue given attention by the Supreme Court in Colorado v. Bertine, supra. The court rejected the idea that the Fourth Amendment mandates the police to prove alternates to impoundment to a vehicle owner. (Emphasis added.) The court explained that "reasonable police regulations relating to inventory procedures administered in good-faith satisfies the Fourth Amendment, even though courts might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure." Id. at 747. The court reasoned, that while offering the owner or operator, an alternate was entirely possible, it was not required by the Constitution; and in fact, that approach may not address the legitimate interests of protecting the police, the property or the community.

In short, the trial court was applying erroneously its own standard of review, as opposed to determining whether the detectives had probable cause to seize and inventory the vehicle. (Emphasis added.) "In dealing with probable cause* * *we deal

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[1] She admitted that had the police informed her that a male (possessing a driver's license of Robert Hale) indicated that she gave him permission to use the car, she would have responded that she did not give such permission and that she did not know anyone by that name.

with probabilities. These are not technical, they are the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians act." Brinegar v. United States (1949), 338 U.S. 160; Carroll v. United States (1925), 267 U.S. 132, 164. In issuing its conclusions of law and fact, the trial court imposed its own procedure over that of the officers. To the extent that the court relied on its alternatives to impoundment, its findings are not warranted. (Emphasis added.)

As the court stated in Illinois v. Gates (1983), 462 U.S. 229, 230, 231: "The evidence thus collected must be seen and weighed not in terms of arbitrary analysis by scholars, but as understood by those versed in the field of law enforcement."

From this array of evidence, the search and seizure was reasonable.

To conclude:

1. On September 1, 1993, a Cutlass Oldsmobile, operated by Thomas Pierce, was traveling south on East 71st (toward Superior), a high crime area.

2. The Oldsmobile carried a driver and two passengers: Nathaniel Flowers (in the front passenger seat, hence easily seen) and Napoleon Durden (in the rear seat).

3. Nathaniel Flowers was recognized by Detective Walker (who grew up with Flowers), of the Street Crimes Unit, whose major intent is to enforce the State's drug laws. Flowers was reputed to be involved in drug transactions.

4. The officer followed the Oldsmobile and, en route, learned through the Police Department computer that the plates on the Cutlass were registered, not to the 1987 Cutlass, but to a 1985 Chevrolet, thus raising the possibility of a stolen vehicle.

5. The driver of the car identified himself as Thomas Pierce (whose occupation was not revealed), who possessed over

$900 in cash and a pager (to receive messages).

6. When an officer approached Pierce for identification, he produced an Ohio driver's license issued to Robert Hale and informed the unit that he had won a Motion to Quash Evidence -- before.

7. After the officer issued a ticket to Robert Hale for improper plates, Pierce disclosed that the Hale license was fictitious and used by Pierce to evade his apprehension and extradition as a current fugitive from Pennsylvania.

8. In lieu of Pierce's explanation of the Hale license, Pierce was operating a vehicle in Ohio without a valid Ohio driver's license.

9. When officers asked Pierce about the tags on the Oldsmobile, he told them that he had pagers in the glove compartment that would straighten out the whole matter.

10. Detective Petrovich then looked in the glove box and then reported, "the only thing I did see in the glove box was paperwork from a 30 day tag * * *," which held no relevance because there was not a 30 day tag on the car.

11. The officers ran the VIN of the Oldsmobile but it came back NIF (not in file).

12. Detective Walker separately and alone searched the glove box and reported that he found a receipt of some sort for a 30 day tag and a few cassette tapes but no evidence of ownership.

13. After Detective Petrovich and Detective Walker checked the glove box and reported that: (a) there was nothing there to establish ownership[2] or (b) registration of the vehicle, (c) nor did they know Fransheria was really Pierce's girlfriend or that

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[2] Fransheria testified that her vehicle -- as impounded -- still contained her indicia of ownership; however, the authorities refused to release the car to her without satisfactory evidence of ownership.

(d) she gave Pierce permission to use her car, and (e) since the plates did not come back on the car, an inventory was instituted. The inventors followed proper procedure, which was necessary to protect the police, the property and the community.

Considering all these factors that became part and parcel of the totality of the circumstances, the State successfully bore the burden of proof by demonstrating that the warrantless search and seizure were reasonable. State v. Bevan, supra.

In the aftermath of the inventory, a loaded gun was found in the vehicle, as well as crack cocaine and cocaine powder discovered in the trunk of the car; all of which were claimed by petitioner.

CONCLUSION

Respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court.

The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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NO. 95-1771

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

REPLY TO STATE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

First off, the Court should understand the various findings made by the trial Judge, which formed the basis for his granting the Motion to Suppress, were not determined to be clearly erroneous. Not only this, and not unlike the Court of Appeals (which reversed the grant of the petitioner's Motion to Suppress), counsel-opposite in his flawed formulation of the facts makes and relies on a number of totally indefensible statements. For example, it is said:

(1)

> In addition, after the initial stop was made, [a] *the police determined*[1] *that the driver, petitioner, who was not the owner and an admitted fugitive with a fake driver's license, was unable to produce vehicle registration, certificate of title or any other proof of ownership*. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. [b] Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy.

Brief In Opposition, p. 24. And, it is said:

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[1] Of course, the Record shows the trial Court *did not* make any findings that even slightly tended to form even a slight basis for any of the assertions relied on by counsel *in any* of his substantive arguments.

(2)

The police found no evidence of car ownership. When the driver was asked by the (ticketing) officer for identification, [c] petitioner produced the Ohio driver's license in the name of Robert Hale, [d] which petitioner admitted was a fake permit used by petitioner to evade apprehension and extradition resulting from his then status as a fugitive. Petitioner had over $900 in his possession and a pager (to receive calls). Petitioner [e] claimed that there was evidence of ownership in the glove compartment without disclosing what that evidence was. Both Detectives Petrovich and Walker, singly and separately, searched the glove box and found "some kind of duplication of an application of receipt for a 30-day tag of the State of Ohio." Finding no satisfactory evidence of car ownership or identity of driver, Petrovich followed police procedure by impounding the car to inventory it.

Id., p. 26.

The point here of critical significance turns on the fact that, neither, the facts in the Record or the trial Court's findings support the critical premises in the two statements

quoted above. Not only is there the lack of any evidentiary basis in the Record for either of these quoted statements, they are actually contrary to certain critical findings made by the trial Judge. These findings, in addition to not being clearly erroneous, were not even challenged in the Court of Appeals.

With this being so, the categorical statement that the police knew Thomas Pierce was a "fugitive with a fake driver's license" ***before*** they decided to tow the car is not only indefensible and spurious, it is a gross misrepresentation of the Record and the facts therein.

Likewise in this false fact category is a further tortured version of the facts that lies at the heart of various premises that are indispensable to the State's central thesis. Here it is said that:

> After the occupants had been *searched*, the police questioned petitioner as to the ownership of the vehicle. At this point, petitioner produced an Ohio driver's license in the name of Robert Hale. *Petitioner later*[2] *explained that he was a fugitive from the State of Pennsylvania and was trying to evade apprehension and extradition.* Petitioner told the police that the automobile belonged to his girlfriend, Fransheria Cannon, and

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[2] The word "later," as here used by the State is in the sense that Petitioner made these statements *before* he was arrested and before the car was searched. There is nothing in the Record that supports this contention.

that there was sufficient proof of ownership for the vehicle in the glove compartment.

Id., p. 3. (Emphasis supplied.)

II

It is true that Thomas Hale (as the driver's license petitioner possessed showed him to be) later, but only after he and his passengers had been arrested and delivered to the police station, revealed his true name and told the officer that the driver's license was a fake and that he was a fugitive from Pennsylvania. This he did only after he had been arrested for the contraband found in the car. Petitioner testified he did this because of his responsibility for everything in the car and the fact that his passengers were unaware of its presence. He also testified he believed even then this search was illegal and expressed this opinion to the police. This he testified was so because he had indeed won a case in Pennsylvania because of an illegal search.

With all this being so, particularly since the trial Court fully credited Thomas Pierce's testimony on these points, these particular factual allegations made by the State are thus exposed as a desperate effort to have this Court do what the Court of Appeals did. Simply put, that is, artificially create facts in order to flesh out its prejudged conclusion as to how this case should come out. Surely this Court will not allow this to happen.

Also, counsel-opposite would simply have this Court ignore other findings made by the trial Court which cannot be, and were not, disputed by the State in the Court of Appeals. This incontrovertible fact not only exposes the State's thesis on these points to be outlandish, it also exposes a gross willingness on counsel's part to distort the Record because the Ohio Court of Appeals was able to do so to the satisfaction of the Ohio Supreme Court, which

denied petitioner further appellate review.

For what it is worth, the contention is here being made that this case points up the extreme advantages and confidences prosecutors in Ohio (particularly in Cleveland) have in their ability to successfully manipulate the facts and any findings of fact made that are not consistent with their thesis. What is surprising is for this counsel to learn from this case they would attempt to do so at this level.

III

Next, it is quite true that Detective Walker testified he had heard (**Brief in Opposition, p. 3**) from a mutual acquaintance that Nathaniel Flowers (a passenger in petitioner's car) was involved with drugs. However, the friend denied telling him such was the case. Flowers likewise denied having ever been involved with drugs. And, we are even willing to concede the original stop was justified -- as the trial Court determined.

However, the trial Court also determined, contrary to the State's false assertion, that the actual search of the occupants was commenced as soon as they were ordered out of the car at gunpoint. And, the trial Court determined the search made of the car was illegal. He also rejected the inventory theory counsel-opposite continues to rave about.

With this being so, it is well understood why counsel-opposite would fail to recognize the finding made by the trial Court with reference to the police "remov[ing] petitioner's wallet ...., which was placed on the front hood of the automobile" (**id., p. 3**). Simply put, crediting this fact is inconsistent with the State's thesis that the arrest occurred later and that the contraband was found during an inventory search. Further, the trial Court credited the conduct of the police in doing this and a number of other brazen things as being clearly indicative that petitioner and the others were immediately arrested -- and that their arrests were made without probable cause -- indeed were

pretextual.

Yet counsel, despite the trial Court's rulings, which were not clearly erroneous, would tell this Court petitioner and the others were simply "ordered" from the car and a "pat-down search" was originally conducted (id., p. 3).

Also one does not have to wonder why counsel would, despite contrary evidence in the Record which was credited by the trial Judge, try to convince this Court that petitioner told the police *before* the weapon (concealed under the carpet of the rear seat) or the drugs (concealed in the trunk of the car) were found that he was a fugitive and the driver's license was a fake.

On this point, the incontrovertible fact is the trial Court credited petitioner's testimony that he told the police these things after he and the others had been transported to the police station, miles away and that these statements were made after the contraband items had been found.

Indeed, the Court specifically credited Pierce's testimony that he only told the police these things in the hope the police would understand that the passengers in the car were unaware of the items that had by then already been found.

Now it is true (as counsel argues) that two of the detectives testified they could not find upon checking the glove box any evidence of ownership (id., p. 3). But this is hardly the critical fact. The trial Court *expressly* found, based on the testimony of the defense witnesses, that proof of ownership of the car was in the glove box. Indeed, a third officer testified she saw the envelope these items were in. She says she did not bother to look inside of it.

So postured, it is clear to us that before the prosecutor can offer as facts anything contrary to any of the trial Court's findings, a determination must be made that the findings involved were "clearly erroneous". Now

we do concede that Detective Walker testified at length, as counsel opposite shows in the almost seventeen (17) pages thereof quoted in his Brief. What counsel fails to reckon with, in this regard, is the categorical fact that the trial Court in making his findings of fact, which aptly premised his conclusions, totally and decisively rejected those segments of Walker's testimony counsel would bombard this Court with.

The same is true of counsel's efforts to force the searches actually made here into an inventory format. Doubtless this was done by counsel in the hope this Court would docilely ignore the critical facts here. Simply put, the fact is the inventory theory was rejected by the trial Court for a number of reasons. Not the least of which was because he found the arrests were illegal. Indeed, to argue otherwise one would have to exercise a penchant for manipulating facts at least to the degree Detective Walker was shown to have been capable of.

Next, it should be noted that, as shown in our Petition, this officer testified at the Preliminary Hearing that the original arrest was made after Detective McCauley saw a gun protruding from under the floor mat in the rear seat. Detective McCauley, who was not present when this Preliminary Hearing testimony was given, denied this was so. So postured, the fact that counsel would gospelize Detective Walker's testimony should tell the Court a lot about the quality of the State's evidence and the credibility of its witnesses. It also exposes some of the reasons why the trial Court rejected, as was his prerogative, the testimony of this officer and others.

IV

A further aspect of counsel opposite's flawed reasoning is exposed in the specious argument that "operating a motor vehicle with fictitious license plates is a serious infraction that warranted the stop" (id., p. 24) by

eight armed police officers who brandished their guns and ordered the people from the car. The fact that counsel did not explain to this Court that the ordinance offense for which the stop was ostensibly made is classified as a third degree misdemeanor is hardly a non-factor in these circumstances.

Next, in assailing the trial Court's findings, which are clear enough (in spite of counsel opposite's flawed effort to capsule them in his Brief In Opposition), counsel again tells us "the police found no evidence of car ownership" (id., p. 26). And, we are told (as though the trial Court so held) that it was in the wake of this failure that the car was impounded and inventoried (ibid).

Still another gem in counsel opposite's reasoning emerges from the number of averments offered as a reasoned basis for determining that the arrest and searches made here were lawful. Here, counsel tells us (in paragraphs 6-8, **Brief In Opposition**, p. 29) that when stopped *Thomas Pierce gave* the police the Hale driver's license. Actually *Detective Petrovich obtained* the driver's license with the name Robert Hale *after* all the items had been removed from Pierce's pockets. He then issued a ticket in the "Hale" name for operating a car with plates that were not issued for the car being driven. And, we are told that there on the scene (before the car was searched) Pierce first told the officers he had won an illegal search case in Pennsylvania. This is inconsistent with him telling them his driver's license was a fake before the car was searched. Further, we are told that after this (paragraph 9) Pierce then tried to justify the use of the plates by stating that the papers showing this was so were in the glove box and we are told that it was only after the police failed to find any ownership papers (paragraph 13) that the car was searched.

Aside from the ridiculousness, and the speciousness

of the above rationale, it also clashes both, with findings made by the trial Judge, the Record and any sense of logical reality.

CONCLUSION

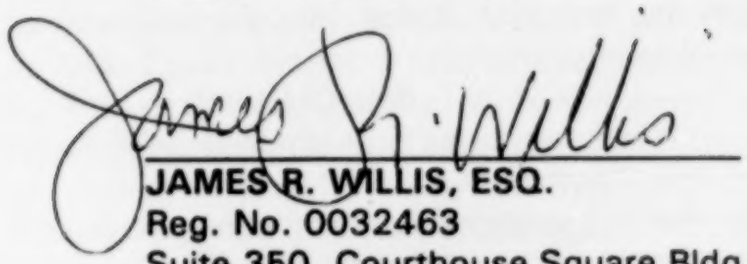
What cannot be over-emphasized here is the showing that the Court of Appeals failed to reject, qualify, or (for that matter) even reckon with various crucial findings of fact made by the trial Court en route to its decision granting Petitioner's Motion To Suppress. Rather than meet these findings head on, the Court of Appeals vented its penchant for imaginative fact finding. This it did in order to justify what it apparently regarded as a proper disposition for this drug case.

Clearly this must be so, for there can be no explanation, none whatsoever, for the Appeals Court (in its Opinion) or the State (in its Brief) not dealing with the findings made by the trial Judge. This is particularly so since the findings made by the trial Judge were fact based. When this is so, and surely would be the case if the shoe were on the other foot, reviewing Courts are barred from indulging in their own brand of fact creation.

With this being so, counsel-opposite's reliance on, and embellishment of, the pseudo-findings made by the Appeals Court should not carry the day for the State in this case. Stated another way, while counsel-opposite would view the findings made by the Appeals Court as though they sprang from some sort of oracle, or Justinian-like force, surely this Court will not fail to recognize that the role of the Court of Appeals was clearly violated here.

Because this is so, it follows that Petitioner does not ask too much when he asks this Court to vindicate his Fourth Amendment rights. These rights were violated by the Court of Appeals when it chose to substitute its own notions as to how this case should have been decided for the fact-based decision made by the original trier-of-fact.

Respectfully submitted,



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